DOCKET

No. 08-1196
Title: Bruce Weyhrauch, Petitioner
v.
United States
Docketed: March 26, 2009
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (07-30339)
Decision Date: November 26, 2008
Rehearing Denied: January 7, 2009
Questions Presented

Date	Proceedings and Orders
Mar 25 2009	Petition for a writ of certiorari filed. (Response due April 27, 2009)
Apr 22 2009	Order extending time to file response to petition to and including May 27, 2009.
May 27 2009	Brief of respondent United States in opposition filed.
Jun 5 2009	Reply of petitioner Bruce Weyhrauch filed.
Jun 9 2009	DISTRIBUTED for Conference of June 25, 2009.
Jun 29 2009	Petition GRANTED limited to the following Question: Whether, to convict a state official for depriving the public of its right to the defendant's honest services through the non-disclosure of material information, in violation of the mail-fraud statute (18 U.S.C. Sec. 1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law.
Jun 30 2009	Motion to modify the Question Presented filed by petitioner Bruce Weyhrauch.
Jul 2 2009	Response to motion from respondent United States filed.
Jul 6 2009	Reply of petitioner to response to motion to modify the question presented filed.
Jul 7 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including September 14, 2009.
Jul 27 2009	Motion to modify the Question Presented DENIED.
Sep 2 2009	The time within which to file respondent's brief on the merits is extended to and including October 28, 2009.
Sep 14 2009	Joint appendix filed. (Statement of costs filed)
Sep 14 2009	Brief of petitioner Bruce Weyhrauch filed.
Sep 16 2009	Consent for the filing of amicus briefs in support of either party or neither party received from counsel for petitioner.
Sep 18 2009	Brief amicus curiae of Albert W. Alschuler filed.
Sep 21 2009	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Sep 28 2009	SET FOR ARGUMENT ON Tuesday, December 8, 2009.
Oct 2 2009	CIRCULATED
Oct 14 2009	Recrs received from U.S.C.A. for 9th Circuit. (1 envelope). The record for the U.S D.C. for the District of Alaska is electronic.
Oct 27 2009	The time within which to file respondent's brief on the merits is further extended to and including October 29, 2009.
Oct 29 2009	Brief of respondent United States filed. (Distributed)
Nov 13 2009	Reply of petitioner Bruce Weyhrauch filed. (Distributed)
Dec 8 2009	Argued. For petitioner: Donald B. Ayer, Washington, D.C. For respondent: Michael R.

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PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

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No. 08-

IN THE

Supreme Court of the United States

BRUCE WEYHRAUCH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. § 1346, by criminalizing denials of "the intangible right of honest services," mandates the creation by the federal courts of a federal common law defining the disclosure obligations of state government officials.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals for the Ninth Circuit were Petitioner Bruce Weyhrauch and Respondent United States.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

A. Background Law 2

B. Background Facts 5

C. Procedural History 6

REASONS FOR GRANTING THE WRIT 10

I. THE COURTS OF APPEALS ARE IN CONFLICT AS TO WHETHER THE DISCLOSURE OBLIGATIONS OF STATE OFFICIALS ENFORCEABLE UNDER 18 U.S.C. § 1346 AS DEPRIVATIONS OF "THE INTANGIBLE RIGHT OF HONEST SERVICES" ARE TO BE DEFINED BY A BODY OF FEDERAL COMMON LAW 10

TABLE OF CONTENTS
(continued)

Page

II. CONSTRUING 18 U.S.C. § 1346 TO MANDATE DEVELOPMENT OF FEDERAL COMMON LAW DEFINING THE DUTIES OF STATE OFFICIALS TO DISCLOSE CONFLICTS OF INTEREST IS IMPROPER FOR SEVERAL REASONS 14

A. This Court's Cases on Recognition of Areas of Federal Common Law Weigh Heavily Against Its Application in This Context 16

B. Defining State Officials' Disclosure Obligations As A Matter Of Federal Common Law Would Raise Serious Constitutional Concerns About The Statute's Vagueness 20

C. It Does Not Comport With The Clear Statement Rule 22

D. It Is Contrary To The Rule Of Lenity 24

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING AN ISSUE OF GREAT AND GROWING IMPORTANCE TO THE FEDERAL SYSTEM 25

CONCLUSION 29

APPENDIX

November 26, 2008 Opinion of the United States Court of Appeals for the Ninth Circuit 1a

TABLE OF CONTENTS
(continued)

Page

September 4, 2007 Opinion of the United States District Court for the District of Alaska 22a

January 7, 2009 Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing En Banc 37a

Transcript of Proceedings, September 5, 2007, Status Conference 38a

TABLE OF AUTHORITIES

Page

Cases

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 22
Atherton v. FDIC, 519 U.S. 213 (1997) 19
Banco Nacional de Cuba v. Sabatino, 376 U.S. 398 (1964) 18
Boyle v. United Technologies Corp., 487 U.S. 500 (1988) 18
Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) 17
City of Chicago v. Morales, 527 U.S. 41 (1999) 21
Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 18
Cleveland v. United States, 531 U.S. 12 (2000) 22, 23
Gregory v. Ashcroft, 501 U.S. 452 (1991) 22, 23
Harris v. United States, 536 U.S. 545 (2002) 20
Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 18
Jones v. United States, 529 U.S. 848 (2000) 22, 24
Kolender v. Lawsun, 461 U.S. 352 (1983) 21
McNally v. United States, 483 U.S. 350 (1987) 2, 3, 14, 24
Miree v. DeKalb County, 433 U.S. 25 (1977) 19
O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) 19, 20
Sorich v. United States, --- S. Ct. ---, 2009 WL 425807 (Feb. 23, 2009) 21
Taylor v. Beckham, 178 U.S. 548 (1900) 23
Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 17, 18
United States v. Bass, 404 U.S. 336 (1971) 22

TABLE OF AUTHORITIES
(continued)

Page

United States v. Black, 530 F.3d 596 (7th Cir. 2008) 26, 27
United States v. Black, 469 F. Supp. 2d 513 (N.D. Ill. 2006) 25
United States v. Bloom, 149 F.3d 649 (7th Cir. 1998) 13
United States v. Bosarino, 437 F.3d 634 (7th Cir. 2006) 25
United States v. Bradley, 428 F. Supp. 2d 1365 (S.D. Ga. 2006) 25
United States v. Brown, 459 F.3d 509 (5th Cir. 2006) 25
United States v. Brumley, 116 F.3d 728 (5th Cir. 1997) 2, 3, 8, 11
United States v. Caldwell, No. C.W.A. 303CV796WN, 2006 WL 1195623 (S.D. Miss. Apr. 28, 2006) 25
United States v. deVegter, 198 F.3d 1324 (11th Cir. 1999) 13
United States v. Frost, 125 F.3d 346 (6th Cir. 1997) 14
United States v. Geddings, No. 5:06-CR-136-ID, 2006 WL 4877548 (E.D.N.C. Sept. 6, 2006) 25
United States v. Gotti, 459 F.3d 296 (2d Cir. 2006) 25
United States v. Hamrick, No. 2:05-CR-119-MEF, 2006 WL 902272 (M.D. Ala. Apr. 5, 2006) 25
United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812) 17
United States v. Kalaycioglu, 210 Fed. App'x 825 (11th Cir. 2006) 25

TABLE OF AUTHORITIES
(continued)

Page

United States v. Kincaid-Chauncey, --- F.3d ---, 2009 WL 415567 (9th Cir. Feb. 20, 2009) 28
United States v. Lanier, 520 U.S. 259 (1997) 17
United States v. Lexin, 434 F. Supp. 2d 36 (S.D. Cal. 2006) 25
United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979) 2
United States v. Martin, 195 F.3d 961 (7th Cir. 1999) 13
United States v. McDonald, 178 Fed. App'x 643 (9th Cir. 2006) 25
United States v. Murphy, 323 F.3d 102 (3d Cir. 2003) 11, 12
United States v. Oakland Cannabis Buyer's Co-op., 532 U.S. 483 (2001) 17
United States v. Panarella, 277 F.3d 678 (3d Cir. 2002) 12
United States v. Safavian, 435 F. Supp. 2d 36 (D.D.C. 2006) 25
United States v. Scrushy, 237 F.R.D. 464 (M.D. Ala. 2006) 25
United States v. Siegelman, 467 F. Supp. 2d 1253 (M.D. Ala. 2006) 25
United States v. Skelly, 442 F.3d 94 (2d Cir. 2006) 25
United States v. Skilling, 554 F.3d 529 (5th Cir. 2009) 27
United States v. Skilling, No. CRIM. H-04-025-02, 2006 WL 3030721 (S.D. Tex. Oct. 23, 2006) 25
United States v. Sorich, 523 F.3d 702 (7th Cir. 2008) 13

TABLE OF AUTHORITIES
(continued)

Page

United States v. Thompson, No. 06-CR-020, 2006 WL 1518968 (E.D. Wis. May 30, 2006) 25
United States v. Turner, 465 F.3d 667 (6th Cir. 2006) 25
United States v. Urciuoli, 513 F.3d 290 (1st Cir. 2008) 23, 27
United States v. Vinyard, 266 F.3d 320 (4th Cir. 2001) 15, 27
United States v. Walker, 490 F.3d 1282 (11th Cir. 2007) 12, 13
United States v. Wecht, No. CRIM 06-0026, 2006 WL 1835818 (W.D. Pa. June 29, 2006) 25
United States v. Williams, 128 S. Ct. 1830 (2008) 21
United States v. Williams, 441 F.3d 716 (9th Cir. 2006) 25
United States v. Wittig, 425 F. Supp. 2d 1196 (D. Kan. 2006) 25
United States v. Woodard, 459 F.3d 1078 (11th Cir. 2006) 25
United States v. Yazell, 382 U.S. 341 (1966) 20
Wheeldin v. Wheeler, 373 U.S. 647 (1963) 16

Statutes & Rules

18 U.S.C. § 1341 ..... *passim*
18 U.S.C. § 1346 ..... *passim*
18 U.S.C. § 3731 8
28 U.S.C. § 1254(1) 1
ALASKA CONST. Art. II, § 9 5
ALASKA STAT. § 24.60.010(4) 7
ALASKA STAT. § 24.60.020(b) 7
ALASKA STAT. § 24.60.200(a)(2) 7

TABLE OF AUTHORITIES
(continued)

Page

Legislative Materials

Pub. L. No. 100-690, 102 Stat. 4508 (1988) 3
134 Cong. Rec. H11108-01 (daily ed. Oct. 21, 1988) 4
134 Cong. Rec. S17360-02 (daily ed. Nov. 10, 1988) 5

Miscellaneous

ALASKA STATE GOVERNMENT & POLITICS (Gerald A. McBeath & Thomas A. Morehouse eds., 1987) 7
BALLANTINE'S LAW DICTIONARY (3d ed. 1969) 15
George G. Brown, *Should Federalism Shield Corruption?*, 82 CORNELL L. REV. 225 (1996) 16
John C. Coffee, Jr., *Modern Mail Fraud*, 35 AM. CRIM. L. REV. 427 (1998) 2, 10, 25
Henry M. Greenberg, *Public Corruption Cases: A Prosecutorial Perspective* (American Bar Association 2005) 26
OXFORD ENGLISH DICTIONARY (2d ed. 1989) 15
Ben Rosenberg, *The Growth of Federal Criminal Common Law*, 29 AM. J. CRIM. L. 193 (2002) 10
U.S. Dep't of Justice, *Stewards of the American Dream: The Department of Justice Strategic Plan FY 2007-2012* (2007) 25
WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) 15

INTRODUCTION

Petitioner seeks review of a Ninth Circuit decision that deepens a split in the circuits over the proper interpretation of the honest services fraud statute, 18 U.S.C. § 1346, in prosecutions of state and local officials. Contrary to the holdings of two other circuits, the Ninth Circuit ruled that the vague language of § 1346 is a mandate to create a federal common law of disclosure obligations of state officials, untethered to any existing, defined disclosure requirements. The Court should take this opportunity to resolve the split in the circuits and clarify the limits of § 1346.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 548 F.3d 1237. The district court's order granting Petitioner's motion to exclude evidence (*id.* at 22a-36a) is unreported.

JURISDICTION

The Court of Appeals issued its decision on November 26, 2008. The Petition for Rehearing *En Banc* was denied on January 7, 2009 (Pet. App. 37a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1341 of Title 18, United States Code, provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or

> artifice or attempting so to do [uses the mails] shall be fined under this title or imprisoned not more than 20 years or both.

Section 1346 of Title 18, United States Code, provides:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT

A. Background Law

Beginning in the 1970s, federal prosecutors began to prosecute state and local officials, such as Maryland Governor Marvin Mandel, under the theory that the mail and wire fraud statutes proscribed schemes to defraud citizens of their intangible right to honest services. *See United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979). The so-called "intangible rights doctrine" "quickly overgrew the legal landscape in the manner of the kudzu vine until by the mid-1980s few ethical or fiduciary breaches seemed beyond its potential reach." John C. Coffee, Jr., *Modern Mail Fraud*, 35 AM. CRIM. L. REV. 427, 427 (1998). By and large, the courts of appeals upheld the Government's right to prosecute state and local officials for their involvement in schemes to defraud citizens for their right to honest and impartial government. *McNally v. United States*, 483 U.S. 350, 355 (1987). But the meaning of "honest services" given by Courts of Appeals "was uneven." *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997) (en banc).

In *McNally v. United States*, 483 U.S. 350 (1987), this Court rejected the view held by the majority of circuits. "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," it read "§ 1341 as limited in scope to the protection of property rights." *Id.* at 360. In order to criminalize defrauding the public of honest services, the Court concluded, a much clearer statement of purpose would be required from Congress. *Id.*

In response to *McNally*, Congress enacted the text of what is now 18 U.S.C. § 1346 on the last day of the 100th Congress as one of some thirty unrelated provisions attached to the Anti-Drug Abuse Act of 1988. *See* Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508 (1988). Section 1346 reads in its entirety: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346.

The text of § 1346 was inserted into the Omnibus Drug Bill for the first time on the very day that the Drug Bill was passed by both the House and the Senate. The language was never included in any bill as filed in either the House of Representatives or the Senate. As a result, the text of § 1346 was never referred to any committee of either chamber, nor was it the subject of any committee report, nor any floor debate reported in the Congressional Record. *Brumley*, 116 F.3d at 739 (Jolly & DeMoss, JJ., dissenting).

There are only two items of legislative history pertinent to the text of § 1346 as actually passed. First, Representative Conyers made remarks on the floor of the House regarding various provisions in the Omnibus Drug Bill, including the section that added § 1346 to Title 18. After describing the Supreme Court decision in *McNally* and its effect on various prior federal circuit court opinions, Representative Conyers stated:

> This amendment restores the mail fraud provision to where that provision was before the *McNally* decision. The amendment also applies to the wire fraud provision and precludes the *McNally* result with regard to that provision.
>
> The amendment adds a new section to 18 U.S.C. 63 that defines the term "scheme or artifice to defraud to include a scheme or artifice to defraud another of the intangible right of honest services." Thus, it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property. This amendment is intended merely to overturn the *McNally* decision. No other change in the law is intended.

134 Cong. Rec. H11108-01 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers).

Second, several weeks after final passage of the Omnibus Drug Bill, the Senate Judiciary Committee entered a report into the Congressional Record stating: "This section overturns the decision in *McNally v. United States* in which the Supreme

Court held that the mail and wire fraud statutes protect property but not intangible rights. Under the amendment, those statutes will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials. The intent is to reinstate all of the pre-*McNally* case law pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17360-02 (daily ed. Nov. 10, 1988) (statement of Sen. Biden).

B. Background Facts

Petitioner Bruce Weyhrauch, a licensed attorney, represented Juneau in the Alaska House of Representatives in 2006 while the House was considering legislation that would alter how the state taxed oil production. Pet. App. 2a. Five days before the legislature's scheduled adjournment, Petitioner—who had concluded that he would not run for reelection—authored a letter to Bill J. Allen, CEO of VECO Corp., an oil field services company, informing Allen that Petitioner had "practiced law and government relations since 1996," and requesting "a further conversation with you about my law office representing VECO." Appellee's Supplemental Excerpts of Record (SER) 19. Consistent with the Alaska Rules of Professional Conduct governing the advertisement of legal services, the letter included a header stating "Advertising Materials." *Id.*

When it appeared that the legislature would adjourn without acting on the taxation legislation, the governor called a 30-day "special joint session." *See* ALASKA CONST. Art. II, § 9. The indictment alleges that before termination of the special session,

Petitioner met with Allen and discussed Petitioner's "request for employment" with VECO and Petitioner's "support of the [oil tax] legislation" sought by Allen and VECO. Appellant's Excerpts of Record (ER) 16. It is further alleged that Petitioner then sought an early adjournment of the special session "before a vote could be taken on an amendment" that Allen and VECO opposed. ER 17.

C. Procedural History

Although Petitioner received no compensation or benefits from VECO—and was never offered and never accepted employment with the company—the Government charged Petitioner with, among other things, devising "a scheme and artifice to defraud and deprive the State of Alaska of its intangible right to honest services . . . performed free from deceit, self-dealing, bias, and concealment," in violation of 18 U.S.C. §§ 1341 and 1346. ER 25.

Prior to trial, the Government proposed to introduce various pieces of evidence to establish that Petitioner violated § 1346 by knowingly concealing a conflict of interest—the fact of his employment discussions with Allen on behalf of VECO. Pet. App. 3a. The proposed evidence included: (1) legislative "ethics publications . . . that contain verbatim excerpts of various Alaska State statutes addressing conflicts of interest and disclosure requirements as well as hypothetical factual scenarios"; (2) evidence that "members of the Alaska State Legislature customarily acknowledge the existence of conflicts of interests on the floor of the Legislature" and "the clerk of each house is required to record such conflict declarations"; (3) descriptions of the "ethics training"

that Petitioner underwent; and (4) evidence that Petitioner served on the Select Committee on Ethics in the Alaska State Legislature. SER 8.

Petitioner moved to exclude the Government's evidence for lack of relevance, on the ground that Alaska law does not require that state legislators disclose ongoing negotiations for employment. SER 24-28. Alaska's Ethics Code, which supersedes the provisions of the common law relating to legislative conflict of interest, requires that a state legislator disclose when he receives more than $1,000 in compensation for "personal services." ALASKA STAT. § 24.60.020(b); ALASKA STAT. § 24.60.200(a)(2). But no companion provision mandates disclosure of employment negotiations or *potential* conflicts of interest.[1] The Government argued that the evidence was nonetheless admissible under the theory that a state legislator commits honest services fraud by knowingly concealing a potential conflict of interest contrary to federal standards of good government.

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[1] Alaska's ethics code reflects the State's allegiance to the model of governance by citizen-legislators. Alaska's constitution limits the length of the legislative session to 120 calendar days to permit "citizens who undertake public service" to have "employment outside the legislature" and enable public officials "to return to private sector jobs and families." ALASKA STATE GOVERNMENT AND POLITICS 243 (Gerald A. McBeath & Thomas A. Morehouse eds., 1987). Because the Alaska citizenry's "commitment to a part-time citizen legislature implies that legislators are expected and permitted to earn outside income," the statutes establishing standards of conduct for state legislators do "not impose unreasonable or unnecessary burdens that will discourage citizens from entering or staying in government service." ALASKA STAT. § 24.60.010(4).

The district court recognized that "the issue . . . turns on whether federal common law may be used to provide the requisite duty to disclose." Pet. App. 30a. It answered that question in the negative, and granted Petitioner's motion to exclude. *Id.* at 36a. Relying on *Brumley*, 116 F.3d 728, the court held that to prosecute Petitioner under §§ 1341 and 1346 for knowingly concealing a conflict of interest, the Government would need to prove that Petitioner violated a duty imposed by state law. *Id.* at 35a-36a. Because Alaska law "does not include a duty to disclose which could have been breached under the circumstances of this case," the court precluded the Government from predicating its honest services charge on a disclosure theory. *Id.* at 36a. Deeming the excluded evidence of "critical relevance" to their case against Petitioner, the Government filed an interlocutory appeal under 18 U.S.C. § 3731. *Id.* at 40a.

The court of appeals reversed and remanded. The court noted that Congress "creat[ed] some confusion over the reach of the mail fraud statute," and that the "circuits have expressed divergent views on the proper meaning of 'honest services' for public officials," Pet. App. 11a, 12a. The Ninth Circuit nonetheless held that § 1346 "establishes a uniform standard for 'honest services' that governs *every* public official and . . . the government does not need to prove an independent violation of state law to sustain an honest services fraud conviction." *Id.* at 21a (emphasis in original). The court acknowledged that "a literal reading of § 1346 might give federal prosecutors *unwarranted influence* over state and local public ethics standards," *id.* at 13a (emphasis in

original), and that an interpretation "requir[ing] the government to prove that a public official violated an independent state law" would address federalism concerns, but nevertheless declined to adopt the state law limiting principle. *Id.* at 12a, 14a.

In rejecting a state law limiting principle, the court found it unlikely that Congress intended the reach of § 1346 to vary state-by-state. Pet. App. 16a-17a. Additionally, the court dismissed the district court's federalism concerns as unpersuasive, holding that the federal government has both the power to regulate use of the mails, and a legitimate "interest in establishing a uniform standard of conduct for public officials" and "in ensuring that state action affecting federal priorities is not improperly influenced by personal motivations of state policymakers and regulators." *Id.* at 21a. The Ninth Circuit concluded further that the application of the federal fraud statutes should not vary with "the happenstance of whether state law prohibits particular conduct." *Id.*

Without defining the outer boundaries of the federal standard, the court held that Congress intended, at the least, to proscribe "(1) taking a bribe or otherwise being paid for a decision while purporting to [exercise] independent discretion and (2) nondisclosure of material information." Pet. App. 19a. The court concluded that Petitioner's "alleged conduct falls comfortably within the two categories" and reversed. *Id.* at 20a. Petitioner filed a timely Petition for Rehearing *En Banc*, which was denied. *Id.* at 37a. This petition followed.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE IN CONFLICT AS TO WHETHER THE DISCLOSURE OBLIGATIONS OF STATE OFFICIALS ENFORCEABLE UNDER 18 U.S.C. § 1346 AS DEPRIVATIONS OF "THE INTANGIBLE RIGHT OF HONEST SERVICES" ARE TO BE DEFINED BY A BODY OF FEDERAL COMMON LAW

The courts of appeals are sharply and increasingly divided on the question whether 18 U.S.C. § 1346 provides a mandate for the creation of a federal common law of disclosure obligations of state and local public officials concerning claimed conflicts of interest.[2]

Three circuits, now including the Ninth, have held that disclosure duties whose breach may be a predicate for a federal "honest services" prosecution of state and local government officials are to be determined as a matter of federal common law. *See* Coffee, *Modern Mail Fraud*, 35 AM. CRIM. L. REV. at 431 ("[S]everal cases have already held that the term ['right of honest services'] is to be defined by federal common law."); Ben Rosenberg, *The Growth of Federal Criminal Common Law*, 29 AM. J. CRIM. L. 193, 204 (2002) (noting that "[t]he Seventh Circuit"

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[2] There is no dispute that *quid pro quo* bribery, or other affirmative frauds for personal gain, in which a public official compromises the performance of his public duties, constitute a deprivation of "honest services" within the meaning of § 1346. The question presented by this case is whether the failure to disclose perceived or potential conflicts of interest, standing alone, can amount to a deprivation of "honest services" where no law apart from § 1346 requires their disclosure.

"held that the 'intangible right to [sic] honest services' is defined by federal common law" and that "[t]he Eleventh Circuit took the same position"). These courts have expressly and necessarily held that, since the legal standard at issue is federal, criminal non-disclosures may occur without any violation of state law or any other statute or regulation. Two other circuits have rejected this view, and held that a public official's non-disclosures cannot constitute a denial of honest services under § 1346 unless the official violates a duty independently imposed on the official, usually by state law.

a. Taking the second group of cases first, in *Brumley*, the Fifth Circuit, sitting *en banc*, categorically rejected the notion that § 1346 announced "a common law crime," 116 F.3d at 732, and instead held that the Government must "prove that conduct of a state official breached a duty" to provide services "owed under state law" to support a prosecution for honest services fraud. *Id.* at 734. The court reasoned that in § 1346, Congress failed to use clear language demonstrating an intent "to garner to the federal government the right to impose upon states a federal vision of appropriate services—to establish, in other words, an ethical regime for state employees." *Id.* The court affirmed the conviction, however, on the basis of ample evidence that the defendant engaged in a scheme to defraud that violated Texas penal law. *Id.* at 735.

The Third Circuit has also "endorse[d] . . . a state law limiting principle for honest services fraud," like the one enunciated in *Brumley*. *United States v. Murphy*, 323 F.3d 102, 116 (3d Cir. 2003) (citing

Brumley). In *Murphy*, the court reversed the § 1346-based conviction of a county political party chairman because the government failed to identify "any clearly established fiduciary relationship or legal duty in either federal or state law" that had been violated. *Id.* at 117. This "clearly established" rule rejects the federal common law approach and its inherent risks. *See United States v. Panarella*, 277 F.3d 678, 693 (3d Cir. 2002) ("[T]he clarity of Pennsylvania's disclosure statute criminalizing a public official's nondisclosure . . . addresses rule of lenity concerns . . . [and] mitigates the federalism concerns that arise from federal prosecutions of local public officials.").

b. The Ninth Circuit now joins at least two other circuits in taking the contrary view that the honest services whose intentional denial can be the basis for a mail or wire fraud prosecution covers an extremely broad scope of conduct to be defined by the federal courts. Following that approach, these courts have expressly rejected the position that a violation of state law is required for a state official to be prosecuted for a criminal non-disclosure.

In *United States v. Walker*, 490 F.3d 1282 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1649 (2008), the Eleventh Circuit upheld the honest services mail fraud conviction of a state legislator, based in part on his failure to disclose a scheme to secure employment for workers of a staffing company that he owned. The court of appeals observed that the "scope of conduct covered by the honest services mail fraud statute is extremely broad," *id.* at 1297, and specifically noted that the "claims against Walker were not predicated on any violation of state law" and that "an honest services mail fraud . . . conviction does not require

proof of a state law violation." *Id.* at 1299. *See also United States v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) ("A public official's undisclosed conflict of interest . . . does by itself harm the constituents' interest in the end for which the official serves—honest government in the public's best interest.").

Finally, the Seventh Circuit has also recognized that § 1346's "unelaborated reference" to "the intangible right of honest services" invites courts to invent "a federal common-law crime, a beastie that many decisions say cannot exist." *United States v. Bloom*, 149 F.3d 649, 654-55 (7th Cir. 1998). In response, it has adopted its own "private gain" requirement, which it acknowledges is a "judicial gloss" on the statute, but one it deems appropriate so that doubts are "resolved against criminalizing conduct." *Id.* at 656-57 (upholding dismissal of § 1346 charge against alderman for failure to allege misuse of office for personal gain). *See also United States v. Sorich*, 523 F.3d 702, 708 (7th Cir. 2008) (reaffirming private gain test while acknowledging criticism that it amounts to "judicial legislat[ion]"), *cert. denied*, --- S. Ct. ---, 2009 WL 425807 (Feb. 23, 2009).[3] At the same time, the Seventh Circuit has considered and rejected any "state law limiting principle." *Id.*; *United States v. Martin*, 195 F.3d 961, 966 (7th Cir. 1999) ("The fear that motivated the *Brumley* decision is that if federal courts are free to devise fiduciary duties the breach of which violates

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[3] The "private gain" requirement is satisfied with evidence that someone—even if not the defendant—"illegitimate[ly] gain[ed]" from the defendant's fraudulent conduct. *See Sorich*, 523 F.3d at 709.

the mail fraud statute, the result will be the creation in effect of a class of federal common law crimes. . . . *Brumley*, however, is contrary to the law in this circuit[.]").

Accordingly, amidst the great confusion in the circuits on a variety of issues surrounding the reach of the honest services fraud statutes, there is a sharp and well-defined circuit split on one seminal issue: whether the non-disclosures by state officials constituting a denial of the right of honest services under § 1346 are to be defined as a matter of judge-made, federal common law, or rather by reference to the body of law that otherwise governs the conduct and obligations of those officials.

II. CONSTRUING 18 U.S.C. § 1346 TO MANDATE DEVELOPMENT OF FEDERAL COMMON LAW DEFINING THE DUTIES OF STATE OFFICIALS TO DISCLOSE CONFLICTS OF INTEREST IS IMPROPER FOR SEVERAL REASONS

Congress enacted 18 U.S.C. § 1346 in direct response to this Court's holding in *McNally v. United States*, which limited § 1341 to "the protection of property rights." 483 U.S. at 360. In a single sentence, with no meaningful legislative history, § 1346 broadened "scheme or artifice to defraud" to include depriving "another of the intangible right of honest services."

On its face, § 1346's reference to a "right" of "services" relates to an obligation of one party to one or more others, arising from some independent source in law. It may arise from a private contract of employment, *see, e.g., United States v. Frost*, 125

F.3d 346, 367-69 (6th Cir. 1997), but more often, in prosecutions under § 1346, arises in the context of employment of a public official. *See, e.g., United States v. Vinyard*, 266 F.3d 320, 326 (4th Cir. 2001) ("honest services theory . . . is directed primarily at the deterrence and punishment of corruption among public officials").

Section 1346's criminalization of the denial of honest services obviously reaches those situations where an official, by fraud or bribery, fails to provide the required services. A legislator who sells his vote, or a procurement officer who assigns government contracts based on bribes received rather than the public interest rules governing contractor selection, has plainly acted dishonestly and failed to provide the service required of him. Such conduct amounts to a fraudulent denial of the services at issue.

This case concerns the distinct situation where the prosecution charges that services rendered were dishonest because information material to the performance of official duties was not properly disclosed. When does a public official's nondisclosure of arguably material information by itself prove that "services" rendered were not "honest," not because a bribe was paid or other fraud proven, but simply because certain information was not disclosed?

Without further clarification of the intended meaning of the statute, we are left with the dictionary definition of the word "honest," as "free from fraud or deception." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1086 (1986); *see also* 7 OXFORD ENGLISH DICTIONARY 349 (2d ed. 1989) (defining "honest" as "free from fraud"); BALLANTINE'S

LAW DICTIONARY 566 (3d ed. 1969) (defining "honest" as "descriptive of one who does not lie or cheat").

The question presented in this case is how the federal courts, in construing the "right of honest services," are to determine whether a state official's failure to disclose certain information is "deceptive," a "lie" or "cheating," and thus not "honest." When the "right" of "services" relates to the obligations of a state official, it is reasonable to expect that state law will prescribe the extent and character of such services to be provided. *See* George D. Brown, *Should Federalism Shield Corruption?*, 82 CORNELL L. REV. 225, 283 n.491 (1996) ("Section 1346 is phrased in terms of the 'right' to honest services. State law governing public officials' conduct can be viewed as creating the correlative duty that establishes the right.").

The court below, however, held unequivocally that the disclosure obligations of state officials whose breach is actionable as a criminal violation of the "right of honest services" should be established by a "uniform" body of federal common law. There are four fundamental reasons why this is wrong.

A. This Court's Cases on Recognition of Areas of Federal Common Law Weigh Heavily Against Its Application in This Context

Under this Court's cases, "[t]he instances where" federal courts properly "create[] federal common law are few and restricted." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). The Ninth Circuit's decision here that the disclosure obligations of state officials subject to prosecution under § 1346 will be

determined as a matter of federal common law cannot be justified under these decisions.

Most obviously, the decision below is at odds with this Court's repeated statements that "there is no federal common law of crimes," *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994), and that "federal crimes are defined by statute rather than by common law." *United States v. Oakland Cannabis Buyer's Co-op.*, 532 U.S. 483, 490 (2001); *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997) ("Federal crimes are defined by Congress, not the courts."); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812) (holding that no federal court may exercise common law jurisdiction in criminal cases). By concluding that federal courts are charged with defining a uniform law of disclosures by governmental officials whose violation will trigger application of federal felony statutes, the Ninth Circuit ruling directs federal courts to define a critical element of a major federal crime.

Beyond that simple rule against common law crimes, the Court has recognized the appropriateness of federal common law only when one or both of two conditions is satisfied: (1) when Congress has invited federal courts "to develop substantive law," and (2) when federal common law "is necessary to protect uniquely federal interests." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). Here, neither condition supports the Ninth Circuit's recognition of a federal common law of disclosure obligations, through 18 U.S.C. § 1346, that "governs *every* public official" in every state. Pet. App. 21a (emphasis in original).

Congress has not invited the federal courts to craft a federal common law regulating the ethics of state officials. Section 1346 is a single sentence. There is neither any language nor any legislative history suggesting any such broad purpose.

Nor is there any "federal interest" in creating a federal common law of the disclosure duties of state officials. *See Tex. Indus.*, 451 U.S. at 640. This Court has found such interests only in a limited number of instances. For example, in *Banco Nacional de Cuba v. Sabatino*, 376 U.S. 398, 407 (1964), the Court found a sufficient federal interest where the Court was asked to determine the effect of a foreign government's expropriation of American owned assets, which determination could have substantial impact "on the conduct of the [United States'] foreign relations and . . . on the proper role of the Judicial Branch in this sensitive area." Likewise, in *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972), this Court found a sufficient federal interest to conclude that federal common law should govern a dispute between two states over pollution of interstate waters. Similarly, in *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943), this Court found a sufficient federal interest justifying federal common law defining the federal government's responsibilities to notify guarantors of federal checks about forged checks. And in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988), this Court formulated a common law government contractor defense, based on the federal interest in protecting the military's equipment procurement process from state tort liability.

Section 1346 raises no federal interest remotely comparable to any of these. Instead, this case much more closely resembles those where this Court has declined to recognize federal common law. In *Miree v. DeKalb County*, 433 U.S. 25, 29 (1977), this Court found no sufficient interest justifying application of federal common law in construing a contract between the FAA and the county owner of an airport, implicating the county's liability to plaintiff air crash survivors. The Court noted that "the litigation before us raises no question regarding the liability . . . or the responsibilities of the United States." *Id.*

In *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994), the Court asked whether there was "a significant conflict between some federal policy . . . and the use of state law," and on that basis rejected federal common law and applied state law principles to determine a variety of issues, even though they affected whether the FDIC could recover from legal counsel representing a savings and loan that had engaged in misconduct.

And in *Atherton v. FDIC*, 519 U.S. 213, 219 (1997), this Court refused to create a national standard of the duty of care owed by officers of federally-insured financial institutions, and instead held that the state law duty of care should apply. The purported federal interest in the present case—defining a federal standard of disclosures by state legislators—falls far short of the asserted federal interest in *Atherton* in regulating conduct by officers at federally-insured banks.

In this case, the Ninth Circuit invoked uniformity, the "most generic (and lightly invoked)"

federal interest, to justify creating federal common law. *See O'Melveny & Myers*, 512 U.S. at 88. But the court never explained the need for such a nationwide standard. For centuries, the nation has survived without a uniform federal law regulating the disclosures of state officials. *Cf. Atherton*, 519 U.S. at 220 ("our Nation's banking system has thrived despite disparities in matters of corporate governance"). Nor does the convenience of federal agencies, such as the United States Attorneys who enforce § 1346, justify creating federal common law. As this Court has noted, if avoiding "state-by-state research" were an "identifiable federal interest, we would be awash in federal common law." *O'Melveny & Myers*, 512 U.S. at 88.

An appropriate "solicitude for state interests" demands that, in the absence of an express congressional mandate, federal common law be recognized only when the application of state law would inflict "major damage" on the "clear and substantial interests" of the federal government. *United States v. Yazell*, 382 U.S. 341, 352 (1966). No such federal interests are remotely implicated in this case.

B. Defining State Officials' Disclosure Obligations As A Matter Of Federal Common Law Would Raise Serious Constitutional Concerns About The Statute's Vagueness

A further compelling reason for not viewing "honest services" as governed by federal common law is that to do so would raise a substantial question of unconstitutional vagueness. "[W]hen a statute is susceptible of two constructions, by one of which

grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Harris v. United States*, 536 U.S. 545, 555 (2002) (quotation and citation omitted). A statute is void for vagueness if the statute either "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008) (citations omitted). Allowing federal common law to define disclosures required to avoid prosecution for denial of "honest services" would fail both prongs of this Court's vagueness test.

First, such a common law approach would not "enable ordinary people to understand what conduct [the statute] prohibits." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion). A state official who adheres to all state law disclosure requirements will be unsure if he or she must make certain further disclosures in order to avoid violating § 1346. The statute would thus violate the first prong of the vagueness test. *Williams*, 128 S. Ct. at 1845.

Second, a common law definition of disclosure obligations would also "encourage[] seriously discriminatory enforcement." *Id.* at 1835. It might well "permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (citation omitted) (finding state criminal statute unconstitutionally vague because "it encourage[d] arbitrary enforcement by failing to describe with sufficient particularity what a suspect

must do in order to" comply with the statute). Without some coherent limiting principle, § 1346 "invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs." *Sorich v. United States*, --- S. Ct. ---, 2009 WL 425807, at *2 (Feb. 23, 2009) (Scalia, J., dissenting from denial of certiorari).

C. It Does Not Comport With The Clear Statement Rule

When an interpretation of a federal statute would "upset the usual constitutional balance" between the federal government and the states, the Court has required "unmistakably clear" statutory language before it adopts that interpretation. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)). This clear statement rule protects the states' "substantial sovereign powers" in our federal system, *id.* at 461, and "assures" that Congress "faced, and intended to bring into issue," the relative powers of the federal government and the states. *United States v. Bass*, 404 U.S. 336, 349 (1971). This rule constrains the legislation Congress can enact by demanding that it be clear in stating its intention.

The clear statement rule applies across the range of federal legislation, including in criminal cases. *See Jones v. United States*, 529 U.S. 848, 858 (2000); *Cleveland v. United States*, 531 U.S. 12, 24 (2000). *Jones* involved a statute criminalizing arson of buildings "used in . . . or affecting commerce," and the Court invoked the clear statement rule in holding that the statute should not be read to cover private owner-occupied residences not used in commerce.

529 U.S. at 858. In *Cleveland*, the Court was faced with the question whether state gaming licenses constituted property within the coverage of the federal mail fraud statute. Because such a conclusion would have involved the federal government in regulating a broad range of conduct formerly regulated by the states, the Court invoked the clear statement rule and found no such statement to exist. 531 U.S. at 24. The clear statement rule has also been applied to federal statutes "prescrib[ing] the qualifications" of state officers. *Gregory*, 501 U.S. at 460 (quoting *Taylor v. Beckham*, 178 U.S. 548, 570 (1900)). In *Gregory*, the Court's reliance on the rule led it to construe the Age Discrimination in Employment Act as inapplicable to state judges.

State governments have primary responsibility to set the performance standards and ethical responsibilities of their own officials. The clear statement rule thus is clearly triggered by any suggestion that Congress has given to the federal courts the task of defining the disclosure obligations of state and local officials that will be subject to federal prosecution.

Certainly § 1346 contains no clear statement of an intention to define state officials' disclosure as a matter of federal common law. The statute is only a sentence long and makes no mention of government officials or their disclosure duties. To the contrary, courts have noted that the scope of § 1346 is "vague and undefined," *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008), and that its "plain language is inconclusive." Pet. App. 12a.

In sum, the statute's prompt enactment and sparse language manifest a clear intention to reverse the holding in *McNally*, and extend the mail and wire fraud statutes beyond crimes involving property to reach those involving intangible rights to honest services. That fact says nothing, however, about the extent or derivation of the intangible rights thus made enforceable. Certainly it does not amount to a clear statement that the federal courts should develop a common law of the disclosure obligations owed by state officials, to be enforced through federal prosecutions.

D. It Is Contrary To The Rule Of Lenity

Finally, this Court has made clear that ambiguities in criminal statutes should be resolved in "favor of lenity." *See Jones*, 529 U.S. at 858. In *McNally*, this Court applied the rule of lenity to the mail fraud statutes, noting that "before one can be punished, it must be shown that his case is plainly within the statute," and refusing to federalize disclosure and "good government" standards of state officials without a clear statement that Congress intended to do exactly that. 483 U.S. at 360 (quotation and citation omitted).

Yet when faced with two rational interpretations of § 1346, the Ninth Circuit improperly chose the one that leaves the statute's outer boundaries indefinite and requires the federal courts to establish a case law defining disclosure obligations of state legislators and other employees. Since the statute is at most ambiguous in not expressly foreclosing the creation of common law disclosure obligation, this Court should reject the interpretation of § 1346 adopted by the

Ninth Circuit and invite Congress to speak more clearly on this point if it desires to go further.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING AN ISSUE OF GREAT AND GROWING IMPORTANCE TO THE FEDERAL SYSTEM

As was true prior to this Court's grant of review in *McNally*, the prosecution of "honest services" fraud in the federal courts has again begun to resemble the spread of a "kudzu vine." Coffee, *supra*, at 427. Since the enactment of § 1346 in 1988, there has been a steady increase in its utilization by federal prosecutors, and in recent years the expansion has been particularly dramatic. By the Government's own count, federal public corruption indictments rose more than forty percent between 2005 and 2007. U.S. Dep't of Justice, *Stewards of the American Dream: The Department of Justice Strategic Plan FY 2007-2012* at 7 (2007), *available at* http://www.usdoj.gov/jmd/mps/strategic2007-2012/index.html. By Petitioner's count, cases generating reported decisions grew in number from nine in 1998 to twenty-two in 2006.[4]

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[4] Reported cases during 2006 were: *United States v. Kalaycioglu*, 210 Fed. App'x 825 (11th Cir. 2006), *cert. denied*, 128 S. Ct. 48 (2007); *United States v. Turner*, 465 F.3d 667 (6th Cir. 2006); *United States v. Woodard*, 459 F.3d 1078 (11th Cir. 2006); *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 2249 (2007); *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006); *United States v. Skelly*, 442 F.3d 94 (2d Cir. 2006); *United States v. Williams*, 441 F.3d 716 (9th Cir. 2006); *United States v. McDonald*, 178 Fed. App'x 643 (9th Cir. 2006), *cert. denied*, 549 U.S. 1179 (2007); *United States v.*

Such cases are highly consequential in a number of respects. They often involve proof by circumstantial evidence following extensive grand jury investigations, and thus consume great quantities of investigative, prosecutorial and judicial resources. *See* Henry M. Greenberg, *Public Corruption Cases: A Prosecutorial Perspective* 1 (American Bar Association 2005), *available at* http://www.abanet.org/rol/publications/asia_raca_mr_greenberg_public_corruption.pdf (public corruption cases are often "complex" and "high-profile," and "require considerable [prosecutorial] resources and careful planning"). Not infrequently, they culminate in lengthy trials and appeals, and command a substantial amount of public attention. *See, e.g.*, *United States v. Black*, 530 F.3d 596, 598, 606 (7th

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Bosarino, 437 F.3d 634 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 3041 (2007); *United States v. Black*, 469 F. Supp. 2d 513 (N.D. Ill. 2006); *United States v. Siegelman*, 467 F. Supp. 2d 1253 (M.D. Ala. 2006); *United States v. Skilling*, No. CRIM H-04-025-02, 2006 WL 3030721 (S.D. Tex. Oct. 23, 2006); *United States v. Geddings*, No. 5:06-CR-136-ID, 2006 WL 4877548 (E.D.N.C. Sept. 6, 2006); *United States v. Wecht*, No. CRIM 06-0026, 2006 WL 1835818 (W.D. Pa. June 29, 2006); *United States v. Thompson*, No. 06-CR-020, 2006 WL 1518968 (E.D. Wis. May 30, 2006); *United States v. Safavian*, 435 F. Supp. 2d 36 (D.D.C. 2006); *United States v. Lexin*, 434 F. Supp. 2d 836 (S.D. Cal. 2006); *United States v. Caldwell*, No. C.W.A. 303CV796WN, 2006 WL 1195623 (S.D. Miss. Apr. 28, 2006); *United States v. Hamrick*, No. 2:05 CR-119 MEF, 2006 WL 902272 (M.D. Ala. Apr. 5, 2006); *United States v. Wittig*, 425 F. Supp. 2d 1196 (D. Kan. 2006); *United States v. Bradley*, 428 F. Supp. 2d 1365 (S.D. Ga. 2006); *United States v. Scrushy*, 237 F.R.D. 464 (M.D. Ala. 2006).

Cir. 2008) (four-month trial of Hollinger CEO followed by appeal involving 161 pages of briefing by defendants). And they are of course serious crimes, carrying large potential penalties.[5] The statute's vagueness and the inconsistency of its application are thus matters of great consequence to the personal rights of all prospective defendants.[6]

Beyond these considerations, this case presents squarely the sensitive federalism issues that pervade prosecutions of state officials under a broadly-construed honest services fraud statute. Indeed, it is difficult to imagine a more direct assault on comity and the benefits that flow from our federal structure,

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[5] Section 1346 expands all "scheme to defraud" offenses in Chapter 63 of the United States Code to encompass denials of honest services. The maximum penalties for those offenses—Section 1341 Mail Fraud; Section 1342 Fictitious Name or Address; Section 1343 Fraud by Wire; Section 1344 Bank Fraud; Section 1348 Securities Fraud—range from five years to thirty years and a $1,000,000 fine per count.

[6] Not surprisingly, inconsistencies have emerged in the application of the honest services provision to private defendants as well as to government officials. Significantly, there is a recognized split between at least five circuits which define breaches of honest services by private actors under a "materiality test," and at least three other circuits which apply a "reasonably foreseeable harm test." *See Vinyard*, 266 F.3d at 327-28 (listing cases). The Seventh Circuit also applies its "private gain" test in the private context. *See, e.g., United States v. Black*, 530 F.3d 596 (7th Cir. 2008), *pet. for cert. filed*, 77 U.S.L.W. 3432 (U.S. Jan. 9, 2009) (No. 08-876). Like public officials, private defendants continue to actively seek clarification of the scope of § 1346. *See id.*; *see also United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009).

than a prosecution predicated on the theory that a state official, though complying with state law, has failed to live up to the ethereal standards of good government established and evolving over time as a matter of federal common law.

Moreover, this case presents an excellent vehicle by which to address the problems posed by the statute, which stem from the "vague and undefined" character of the language used in the statute, *Urciuoli*, 513 F.3d at 294, and the varying approaches courts have taken to its construction.

The decision below embodies a definitive holding that the meaning of "honest services" as applied to disclosures required of state government officials is not limited by state law, but turns on a "uniform" body of federal common law to be developed by the federal courts. Pet. App 21a. Indeed, the decision below has already been recognized as standing for precisely that legal rule. *See United States v. Kincaid-Chauncey*, --- F.3d ---, 2009 WL 415567, at *20-21 (9th Cir. Feb. 20, 2009) (Berzon, J., concurring) (recognizing *Weyhrauch*'s holding that the disclosures required by the right of honest services are to be determined as a matter of federal common law).

In opening the door to federal common law-making, the circuits which have taken that approach have invited the development of a range of legal rules and limiting principles, and the present chaos in the circuits is the predictable result. By resolving the fundamental question squarely and unambiguously presented by this case—whether federal common law governs the disclosure obligations of state officials

under the honest services fraud statute—the Court could do much to clarify the broader confusion surrounding the statute.

CONCLUSION

For the reasons set forth above, the petition should be granted.

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APPENDIX

No. 07-30339

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

Bruce **WEYHRAUCH**, Defendant-Appellee.

Appeal from the United States District Court for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted—Anchorage, Alaska

Filed November 26, 2008

Before: Dorothy W. Nelson, A. Wallace Tashima and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher.

FISHER, Circuit Judge:

This is an interlocutory appeal by the government of the district court's pretrial order excluding evidence from a mail fraud prosecution. It presents a matter of first impression in this circuit—whether a federal honest services mail fraud prosecution under 18 U.S.C. §§ 1341 and 1346 requires proof that the conduct at issue also violated an applicable state law. Preliminarily, we must also address the government's repeated failures to certify this appeal properly according to the jurisdictional requirements of 18 U.S.C. § 3731. We accept the government's fourth attempt to certify, and thus have jurisdiction under § 3731. On the merits, we disagree with the district

court that a state law violation is required, and thus reverse the court's order excluding certain evidence from trial.

I. BACKGROUND

Defendant Bruce Weyhrauch, a lawyer, was a member of the Alaska House of Representatives in 2006 while Alaska's legislature was considering legislation that would alter how the state taxed oil production. According to the criminal indictment against him, VECO Corp., an oil field services company, took an active interest in the legislature's reconsideration of the oil tax, and two of its executives had a series of contacts with Weyhrauch regarding the pending legislation.[1] The indictment alleges that Weyhrauch solicited, by mail, telephone and personal contact, future legal work from VECO in exchange for voting on the oil tax legislation as VECO instructed and taking other actions favorable to VECO in Weyhrauch's capacity as state legislator, such as maneuvering the legislation and reporting information about proposed changes to the legislation to the VECO executives. The indictment does not allege that Weyhrauch received any compensation or benefits from VECO or its executives during this period, but alleges facts suggesting that Weyhrauch

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[1] The government prosecuted Weyhrauch and Peter Kott, another state legislator, together. On September 5, 2007, after the government informed the parties and district court that it intended to appeal the district court's decision excluding evidence as to Weyhrauch only, the district court granted Weyhrauch's severance motion. Kott was then tried on four of the counts in the indictment and convicted of three. Kott has appealed his conviction and sentence. *See United States v. Kott*, No. 07-30496. This appeal does not concern Kott's conviction.

took the actions favorable to VECO on the understanding that VECO would hire him in the future to provide legal services to the company.

Count VII of the indictment charges Weyhrauch with devising "a scheme and artifice to defraud and deprive the State of Alaska of its intangible right to [his] honest services . . . performed free from deceit, self-dealing, bias, and concealment" and attempting to execute the scheme by mailing his resume to VECO ("the honest services charge"). Before trial, the parties filed cross-motions regarding the admission or exclusion of evidence related to the honest services charge. Specifically, the government proposed to introduce: (1) legislative ethics publications containing excerpts of various Alaska state statutes addressing conflicts of interest and disclosure requirements; (2) evidence that members of the Alaska State Legislature customarily acknowledge the existence of conflicts of interests on the floor of the Legislature, and that Weyhrauch never disclosed he was negotiating for employment with VECO; (3) a description of the ethics training Weyhrauch had received; and (4) evidence that Weyhrauch served on the Legislature's Select Committee on Ethics.

The district court found that the proffered evidence related only to duties to disclose a conflict of interest that might be imposed by *state* law, and that state law did not require Weyhrauch to disclose the conflict of interest he faced in discharging his duties while negotiating for future employment with a company affected by pending legislation.[2] The government

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[2] The government has not appealed these aspects of the district court's ruling.

argued that the evidence should nonetheless be admitted because proof that a legislator knowingly concealed a conflict of interest may be used to support an honest services fraud conviction even if state law does not require disclosure of the conflict of interest. Recognizing an absence of Ninth Circuit precedent and a split among the other circuits on this issue, the district court adopted the approach outlined by the Fifth Circuit in *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997)(en banc), and concluded that "any duty to disclose sufficient to support the mail and wire fraud charges here must be a duty imposed by state law." Accordingly, on September 4, 2007, the district court granted Weyhrauch's motion, denied the government's motion and excluded the proffered evidence. The next day, September 5, the government initiated this interlocutory appeal of the district court's ruling.

II. STANDARD OF REVIEW

We review a district court's ruling excluding evidence for abuse of discretion. *See United States v. Alvarez*, 358 F.3d 1194, 1205 (9th Cir. 2004). "The district court abuses its discretion when its evidentiary rulings are based on an erroneous view of the law or a clearly erroneous assessment of the facts." *United States v. Nguyen*, 465 F.3d 1128, 1130 (9th Cir. 2006)(internal quotation marks omitted).

III. CERTIFICATION OF THIS APPEAL UNDER § 3731

[1] Under 18 U.S.C. § 3731, the government may bring an interlocutory appeal "if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in

the proceeding." *See United States v. W.R. Grace*, 526 F.3d 499, 504-05 (9th Cir. 2008)(en banc). We recently recounted in detail the procedural history of this interlocutory appeal in a published order, *see United States v. Weyhrauch*, ___ F.3d ___, 2008 WL 4277587 (9th Cir. Sept. 8, 2008)(order to show cause), so we summarize only the pertinent details here.

Nicholas Marsh, lead trial counsel from the Department of Justice, Criminal Division, Public Integrity Section (PIS), orally advised the district court at a September 5 pre-trial conference that the government intended immediately to appeal the ruling, that the excluded evidence was substantial proof of a material fact and that the appeal was not being taken for the purpose of delay. Based on this oral certification, the district court stayed the trial pending the interlocutory appeal. However, because the purported certification to the district court was not made by the United States Attorney as required by § 3731, before oral argument we issued an order to show cause (OSC) why the appeal should not be dismissed as improperly certified.

In its response, the government argued that Marsh's certification was sufficient under § 3731 because it was made in consultation with and at the discretion of William M. Welch II, Chief of PIS, who was overseeing the prosecution, and submitted a document signed by Chief Welch, dated July 25, 2008, certifying the appeal pursuant to § 3731. The government failed to explain how Chief Welch, who is not a United States Attorney, could properly certify an appeal under § 3731, so after oral argument we issued a second OSC to address this issue.

In response, the government submitted a formal recusal notice, dated November 7, 2005, from the Executive Office for United States Attorneys stating that the United States Attorney's Office for the District of Alaska was recused from the investigation that led to the prosecution of Weyhrauch and that PIS had agreed to handle the matter in its entirety. The government also continued to argue that trial attorney Marsh's September 7, 2007 certification was sufficient, but on a new theory that he was himself authorized to certify the appeal because he had been specially appointed under 28 C.F.R. § 0.13(a) by the Deputy Assistant Attorney General and therefore was authorized to conduct "any legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct." 28 C.F.R. § 0.13(a). In a published OSC, we held that the recusal notice failed to explain Chief Welch's authority to certify the appeal and rejected the government's argument that any attorney specially appointed under § 0.13(a) can certify an interlocutory appeal under 18 U.S.C. § 3731. *Weyhrauch*, 2008 WL 4277587 at *3, *6. We gave the government a final opportunity to demonstrate that this appeal was properly certified.

[2] On September 22, 2008, the government submitted two documents signed by Attorney General Michael Mukasey.[3] In the first, the Attorney General

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[3] Remarkably, the government also continued to argue that the recusal notice was sufficient to demonstrate that Chief Welch possessed authority to certify the appeal. Setting aside for the moment that the government's filing was made in response to an order in which we squarely held that the recusal notice was

averred that the appeal was not taken for the purposes of delay and that the evidence at issue is substantial proof of facts material to the proceeding; in the second, he ratified Chief Welch's written certification of July 25, 2008 and confirmed that Chief Welch had been delegated authority to make that certification. We accept that the Attorney General can himself certify an appeal. Plainly, Congress' designation of the United States Attorney as the one authorized to make the requisite § 3731 certification was not intended to preclude certification by an equivalent or higher authority should there be no United States Attorney or acting United States Attorney overseeing a prosecution.[4]

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insufficient, the government's continued insistence that the recusal notice is sufficient ignores the rationale for our holding: when an investigation or prosecution is being overseen by someone outside of a United States Attorney's office, that person can certify an appeal only if properly appointed pursuant to 28 U.S.C. § 515(a) as the acting United States Attorney for the purposes of that investigation or prosecution. Although a document demonstrating that an entire United States Attorney's office was recused from a case does suggest that someone else is running that case, it does not demonstrate that the Attorney General appropriately appointed that person as acting United States Attorney or to certify an appeal under 18 U.S.C. § 3731.

[4] As the government noted in its most recent filing, some investigations originate and are conducted within the Department of Justice, without any involvement of the local United States Attorney's office. The Department would do well to adopt procedures to ensure that someone has been expressly delegated authority to certify interlocutory appeals under § 3731 in such cases. *See Weyhrauch*, 2008 WL 4277587, at *4-5 (holding that someone outside of a United States Attorney's office can certify an appeal under § 3731 only if specifically appointed to do so under 28 U.S.C. § 515(a)).

Because the ultimate authority to appoint an acting United States Attorney rests with the Attorney General under 28 U.S.C. § 515(a), *see Weyhrauch*, 2008 WL 4277587, at *4, the Attorney General can certify an appeal under § 3731 if no one else has been properly designated to do so. Because we conclude that the Attorney General's own certification is sufficient, we do not decide whether ratification alone would suffice. *See Weyhrauch*, 2008 WL 4277587, at *4 (noting that the government "has not submitted any *documentation* that the Attorney General or his delegee in the EOUSA explicitly appointed Chief Welch as a special attorney or special assistant under 28 U.S.C. § 515(a) to be the acting United States Attorney for the Weyhrauch investigation and prosecution" (emphasis added)).

Although the Attorney General's certification is a proper substitute for that of the United States Attorney for Alaska, we must still decide whether to exercise our discretion to accept the certification at this late date. *See W.R. Grace*, 526 F.3d at 507 n.4. Weyhrauch offers two reasons why we should decline to do so. First, he contends that he has been prejudiced by the government's failure to certify this appeal properly at the outset, thereby delaying the appeal and his opportunity to address the charges against him and causing him to incur additional legal expenses defending against it. Any criminal defendant would suffer those consequences under § 3731, however, yet Congress nonetheless has authorized the government to pursue interlocutory appeals despite such hardships. Thus, Weyhrauch has been prejudiced largely by the interlocutory appeal itself, not by the government's deficient certification. Although we are sympathetic to

Weyhrauch because the certification dispute, which arose only because the government failed to comply with § 3731, may have aggravated his cost of defending against the appeal, we decline to dismiss the appeal on that basis alone.

Second, Weyhrauch suggests that the government's conduct demonstrates that it did not take the § 3731 certification requirement seriously. *See W.R. Grace*, 526 F.3d at 507 ("Congress plainly intended that the decision to take an interlocutory appeal be a serious, considered judgment. . . ."). The government's belief that the oral certification by the line prosecutor and the subsequent written certification by Chief Welch without accompanying documentation of his delegated authority were sufficient is certainly difficult to fathom in light of our previous holdings. *See Weyhrauch*, 2008 WL 4277587, at *3 ("[O]ur prior decisions make clear that a § 3731 certification must be made personally by the United States Attorney or by someone acting with legitimate, delegated authority that is sufficiently documented." (internal citations omitted)). Nonetheless, we are satisfied that the government did not take the decision to appeal lightly. The government has represented that the trial attorney consulted with the attorney supervising the prosecution and the Solicitor General before initiating the appeal. The legal issue on the merits presents a question of first impression in this circuit and therefore is not frivolous. Even though the government was careless about the certification process, we conclude that the government did not willfully disregard the certification requirement itself.

Moreover, because this case presents a factual scenario (recusal of the entire United States Attorney's office) not addressed in any of our prior opinions (or by any other circuit) and the Attorney General has now given this issue his personal attention, we will excuse the government's confusion and allow it to supplement the record with the Attorney General's certification. In doing so, however, we point out that we have previously invited the government to submit documentation of properly delegated authority when the certification is made by someone other than the United States Attorney, *see United States v. Wallace*, 213 F.3d 1216, 1219 (9th Cir. 2000), and more recently held that a trial attorney lacks authority to certify an appeal, *see W.R. Grace*, 526 F.3d at 506. Apparently, our hortatory language and square holdings have not convinced the government that the statutory requirements for § 3731 certification are *requirements* rather than suggestions. We shall not be so forgiving in the future. *See United States v. Eccles*, 850 F.2d 1357, 1359 (9th Cir. 1988) ("We recognize . . . that a general rule excusing the government from filing a certificate until after oral argument would eviscerate the statutory requirement that the United States attorney certify that the appeal has not been taken to delay trial.").

IV. HONEST SERVICES MAIL FRAUD

Accepting our jurisdiction under 18 U.S.C. § 3731, we address whether the district court properly excluded the government's proffered evidence. Weyhrauch was indicted under 18 U.S.C. § 1341, which criminalizes the use of the postal services in carrying out a "scheme or artifice to defraud, or for

obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Before 1987, we and other courts interpreted § 1341 as covering schemes to defraud another not just of money and property, but also of "intangible rights," including the right of citizens to have public officials perform their duties honestly. *See United States v. Williams*, 441 F.3d 716, 721-22 (9th Cir. 2006); *see also United States v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008). In 1987, the Supreme Court rejected the intangible rights theory of mail fraud, holding:

> Rather than construe [§ 1341] in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further it must speak more clearly than it has.

McNally v. United States, 483 U.S. 350, 360 (1987).

[3] Shortly thereafter, Congress in 1988 chose to "speak more clearly" by enacting 18 U.S.C. § 1346, specifying that for the purposes of the mail, wire and bank fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." *See Williams*, 441 F.3d 721-22 (holding that Congress restored the pre-*McNally* landscape by passing § 1346). Unfortunately, Congress did not define the concept of "honest services" in § 1346, thereby creating some confusion over the reach of the mail fraud statute. *See United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008) ("The central problem is that the concept of 'honest services' is vague and

undefined by the statute. So, as one moves beyond core misconduct covered by the statute (*e.g.*, taking a bribe for a legislative vote), difficult questions arise giving coherent content to the phrase through judicial glosses."). Because the statute's plain language is inconclusive, we turn for guidance in construing the statute to our pre-*McNally* case law and any relevant post-*McNally* decisions, and then consider pre- and post-*McNally* decisions from our sister circuits. *See Williams*, 441 F.3d at 722.

[4] The district court accurately observed that we have not considered what § 1346 requires of public officials and that our sister circuits have expressed divergent views on the proper meaning of "honest services" for public officials. The Fifth Circuit has adopted the so-called "state law limiting principle," which requires the government to prove that a public official violated an independent state law to support an honest services mail fraud conviction. *See Brumley*, 116 F.3d at 734-35. The Third Circuit has adopted a similar rule requiring the government to prove the public official violated a fiduciary duty specifically established by state *or* federal law. *See United States v. Murphy*, 323 F.3d 102, 116-17 (3d Cir. 2003).

The majority of circuits, however, have held that the meaning of "honest services" is governed by a uniform federal standard inherent in § 1346, although they have not uniformly defined the contours of that standard. *See Sorich*, 523 F.3d at 712 (holding that sources other than state law can establish a duty to provide honest services); *Urciuoli*, 513 F.3d at 298-99 (declining to read honest services fraud statute to require violation of state law);

United States v. Walker, 490 F.3d 1282, 1299 (11th Cir. 2007) (holding that an honest services fraud conviction "does not require proof of a state law violation"); *United States v. Bryan*, 58 F.3d 933, 942 (4th Cir. 1994) (holding that the duty of honesty is defined irrespective of the existence of state law). The Seventh Circuit has read § 1346 to require public officials to breach a fiduciary duty with an intent to reap public gain to support an honest services mail conviction, *see Sorich*, 523 F.3d at 708, and the First Circuit has suggested that the official's misconduct must involve more than a mere conflict of interest to support a conviction, *see Urciuoli*, 513 F.3d at 298-99. Finally, several circuits have read into § 1346 the requirement that a public official's breach of duty must be material and accompanied by fraudulent intent. *See United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997); *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996). In essence, our sister circuits have construed the meaning of "honest services" in ways that limit, to differing degrees, the reach of § 1346 into state and local public affairs.

One concern is that a literal reading of § 1346 might give federal prosecutors *unwarranted influence* over state and local public ethics standards. *See Brumley*, 116 F.3d at 734 (expressing concern that reading § 1346 to create a uniform standard of conduct would erode federalist structure). This is particularly relevant in light of the Supreme Court's admonition that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes," *Cleveland v. United States*, 512 U.S. 12, 25 (2000) (internal quotation marks omitted). Other valid considerations are (1) the need to give public

officials *fair notice* of the conduct that would subject them to the federal fraud statutes' serious criminal penalties, *see Urciuoli*, 513 F.3d at 294 (noting the need to assure "fair notice to those governed by the statute"), *see also Williams*, 441 F.3d at 724 ("In examining a statute for vagueness, we must determine whether a person of average intelligence would reasonably understand that the charged conduct is proscribed."); (2) a desire to establish *firm boundaries* lest every dishonest act by public officials lead to federal criminal liability, *see Sorich*, 523 F.3d at 707-08 (noting the need for a limiting principle that "cabins zealous prosecutors by insuring that not every violation of a fiduciary duty becomes a federal crime"); *Urciuoli*, 513 F.3d at 294 (expressing concern that the statute might "embrace every kind of legal or ethical abuse remotely connected to the holding of a governmental position"); and (3) the potential for *selective enforcement* against public officials, many of whom engage in partisan political activity.

The Fifth Circuit's state law limiting principle, which the district court adopted, addresses all of these concerns. It limits how much control federal prosecutors have over state public affairs by restricting federal criminal liability to conduct prohibited by states themselves and sets a clear outer limit to the reach of the federal statute by tying liability to violations of specific state statutes, thereby allaying concerns over fair notice. Moreover, to the extent the honest services doctrine is intended to ensure public officials act ethically, elected state officials are accountable to their constituencies, who can punish dishonest or unethical conduct directly at the ballot box, and nonelected state officials may be subject to state ethics laws, which can be

strengthened through the democratic process. Thus, because the federal criminal statutes are not the only remedy for dishonest conduct not proscribed by state law, there is some degree of logic in reserving to the states exclusive control over the ethical standards for their own public officials.

Nonetheless, we decline to adopt the state law limiting principle.[5] As an initial matter, our pre-McNally decisions do not support the conclusion that federal fraud statutes derive their content solely from state law. In *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980), we explained that the basis for prosecuting public officials for honest services fraud rests on "the deprivation of the public's right to honest and faithful government." This broad characterization of the duty, without reference to any underlying state law duty, suggests that public officials' duty of honesty is uniform rather than variable by state. We were less equivocal in *United States v. Louderman*, 576 F.2d 1383, 1387 (9th Cir. Cir. 1978), holding that "state law is irrelevant in determining whether a certain course of conduct is violative of the wire fraud statute." Although *Louderman* is not directly on point because it

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[5] Although we reject the state law limiting principle in the context of honest services prosecutions of public officials, we express no opinion on the role of state law in honest services fraud prosecutions in the *private* context. *See Sorich*, 523 F.3d at 708 (noting that courts have "crafted special requirements in the limited context of honest services fraud in the private sector"). Similarly, we express no opinion on what effect, if any, state law that expressly condones or excuses certain conduct would have because Alaska law did not excuse Weyhrauch's conduct here. *See Urciuoli*, 513 F.3d at 298 (observing that state law might be relevant if it "immunize[s]" certain conduct).

involved a traditional wire fraud prosecution rather an honest services mail fraud prosecution, our refusal to define the federal fraud statutes based on the contours of state law informs our decision here. In short, we have never limited the reach of our federal fraud statutes only to conduct that violates state law.[6]

[6] We also cannot find any basis in the text or legislative history of § 1346 revealing that Congress intended to condition the meaning of "honest services" on state law. Because laws governing official conduct differ from state to state, conditioning mail fraud convictions on state law means that conduct in one state might violate the mail fraud statute, whereas identical conduct in a neighboring state would not. Congress has given no indication it intended the criminality of official conduct under

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[6] We recently affirmed the conviction of a private individual for honest services fraud because he breached his fiduciary duty of loyalty. *See Williams*, 441 F.3d at 722-24. We explained that the defendant stood in a fiduciary relationship to his victim, citing an Oregon statute about powers of attorney, *id.* at 723, but later observed that the defendant "undertook the high duties of honesty and loyalty" without reference to the state statute, *id.* at 724. Arguably, our citation to the state law suggests we relied on state law as the source of the fiduciary relationship. On the other hand, we affirmed the conviction because the defendant violated duties of honesty and loyalty, which are mentioned nowhere in the text of the state statute, so our decision may have turned on uniform duties of honesty and loyalty that exist in all relationships of trust. *See Sorich*, 523 F.3d at 712 (citing *Williams* for the proposition that a source other than state law can create a fiduciary obligation). In any event, we were not required in *Williams* to decide if § 1346 requires a violation of state law, so we do not find our passing reference to a state statute conclusive on how we might have ruled had that issue been squarely presented.

federal law to depend on geography. Moreover, although the Supreme Court has warned against interpreting the mail fraud statute to allow federal prosecutors to intrude into areas traditionally governed by state law absent a clear showing that Congress intended to do so, *see Cleveland*, 531 U.S. at 24 (expressing reluctance over subjecting "to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities"); *McNally*, 483 U.S. at 360 (declining to read the mail fraud statute "in a manner that . . . involves the Federal Government in setting standards of disclosure and good government for local and state officials), Congress demonstrated a clear intent to reinstate the line of pre-*McNally* honest services cases when it enacted § 1346, *see Williams*, 441 F.3d at 721-22. Because pre-*McNally* honest services fraud cases generally did not require state law to create the duty of honesty that public officials owe the public and the plain language of the statute does not refer to state law, we cannot infer that Congress intended to import a state law limitation into § 1346.

[7] Finally, federal action based on a valid constitutional grant of authority is not improper simply because it intrudes on state interests. *See* U.S. Const. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the land."). Congress has a legitimate constitutional basis for preventing public officials from using the mails to perpetrate fraud, *see Badders v. United States*, 240 U.S. 391, 393 (1916) (holding that Congress may forbid putting letters in the mail "in furtherance of a scheme it regards as contrary to public policy, whether it can forbid the scheme or not"), so the

federal interest in establishing a uniform standard of conduct for public officials merits equal consideration. That interest is not limited to preventing individuals from using the mails as a tool in a fraudulent scheme. States often regulate industries that are national and international in scope and that the federal government also regulates under concurrent constitutional authority, including the financial services, transportation, communications, oil, gas and timber industries. State regulations of these industries can have national or international implications, so the federal government may wish to prevent state action in these areas from being improperly influenced. Similarly, state laws that affect economic development within a state can influence the federal budget, reduce federal tax receipts and broadly affect the national economy. In short, Congress has a legitimate interest in ensuring that state action affecting federal priorities is not improperly influenced by personal motivations of state policymakers and regulators, and the happenstance of whether state law prohibits particular conduct should not control Congress' ability to protect federal interests through the federal fraud statutes, which are predicated on valid federal constitutional authority to regulate the mails.[7]

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[7] This prosecution illustrates how national policies are implicated by alleged fraud against the people of a state. Alaska's oil tax legislation could influence how companies across the nation develop and exploit petroleum resources (particularly which geographic area would be a priority for investment), with consequences for the national economy and national energy policy. Under the state law limiting principle, however, the federal government would be deprived of its ability to protect

[8] Having rejected the state law limiting principle, we next consider the appropriate contours of honest services fraud. Our pre-*McNally* cases recognized two core categories of conduct by public officials that other courts have found sufficient to support an honest services conviction: (1) taking a bribe or otherwise being paid for a decision while purporting to be exercising independent discretion and (2) nondisclosure of material information. *See Bohonus*, 628 F.2d at 1171 (citing cases). Post-*McNally* public honest services fraud cases from other circuits have generally fallen into one of those two categories. *See Urciuoli*, 513 F.3d at 295 n.3 ("Typical [post-*McNally*] cases involve votes paid for by bribes or based on private undisclosed financial interests of the legislator, awarding of contracts based on bribes, and the filing of false financial disclosure forms or other non-disclosures in relation to official duties." (internal citations omitted)). The post-*McNally* decisions from our sister circuits confirm our view in *Bohonus* that conduct on par with bribery and nondisclosure of material information lies at the heart of public honest services fraud. Notably, both categories of misconduct undermine transparency in the legislative process and other governmental functions. Because public officials may legitimately disagree over which of the many competing interests in society deserve support from the state, without transparency the public cannot evaluate the motivations of public officials who are purporting to act for the common good to determine whether they are in fact acting for their own benefit. Thus, the two

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these federal interests against allegedly corrupt influences simply because a state law did not expressly forbid the conduct.

core categories of misconduct supporting public honest services fraud ensure transparency, without which the public cannot determine whether public officials are living up to their duty of honesty. *See* John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 444 (1998) (noting that courts agree that "§ 1346 may constitutionally be applied to schemes by state or local governmental officials to deprive citizens of their honest services as public fiduciaries"). We are persuaded that Congress' intent in reinstating the honest services doctrine after *McNally* was to bring at least the two core categories of official misconduct within the reach of § 1346.

[9] Here, Weyhrauch allegedly voted and took other official actions on legislation at the direction of VECO while engaged in undisclosed negotiations for future legal work from VECO. These allegations describe an undisclosed conflict of interest and could also support an inference of a quid pro quo arrangement to vote for the oil tax legislation in exchange for future remuneration in the form of legal work. Because Weyhrauch's alleged conduct falls comfortably within the two categories long recognized as the core of honest services fraud, we need not define the outer limits of public honest services fraud in this case. Accordingly, the government may proceed on its theory that Weyhrauch committed honest services fraud by failing to disclose a conflict of interest or by taking official actions with the expectation that he would receive future legal work for doing so.[8]

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[8] The honest services doctrine exists within the broader context of the mail and wire fraud statutes, however, so the

V. CONCLUSION

[10] We hold that 18 U.S.C. § 1346 establishes a uniform standard for "honest services" that governs *every* public official and that the government does not need to prove an independent violation of state law to sustain an honest services fraud conviction. Because the district court excluded the evidence based, in part, on its conclusion that the government had to prove that state law imposed an affirmative duty on Weyhrauch to disclose a conflict of interest, we reverse. The government did not appeal the district court's ruling that the proffered evidence relates only to state law, and we express no opinion whether the proffered evidence is relevant to proving the government's case under the standard we have announced and leave that determination to the district court's sound judgment.

REVERSED AND REMANDED.

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government must still prove fraudulent intent, *see Cochran*, 109 F.3d at 667 (holding that "§ 1346 must be read against a backdrop of the mail and wire fraud statutes, thereby requiring fraudulent intent"); *Bohonus*, 628 F.2d at 1172 ("Neither breach of a fiduciary duty, nor the receipt of secret profits . . . would suffice, standing alone, to show a [mail fraud] violation; there must be a recognizable scheme formed with intent to defraud."), and materiality, *see Neder v. United States*, 527 U.S. 1, 25 (1999) (holding "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes").

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff,

v.

Peter KOTT and Bruce WEYHRAUCH,
Defendants.

No. 3:07-cr-00056 JWS

ORDER AND OPINION

[Re: Docket Nos. 193 and 195]

I. MOTIONS PRESENTED

This order addresses defendant Bruce Weyhrauch's motion seeking to exclude certain evidence at docket 193. This order also addresses the United States' motion seeking an order permitting the admission of certain evidence at docket 195. Responsive briefing was filed at dockets 204, 205, and 206.

II. BACKGROUND

Defendants Peter Kott and Bruce Weyhrauch are former members of the Alaska Legislature who are charged with a variety of felonies relating to their service as legislators. The Indictment charges each with conspiracy to commit extortion under color of official right, bribery, and honest services mail and wire fraud in violation of 18 U.S.C. § 371. It also charges Kott with interference with commerce by extortion induced under color of official right in violation of 18 U.S.C. § 1951(a), bribery concerning

programs receiving federal funds in violation of 18 U.S.C. § 666(a)(1)(b), and honest services wire fraud in violation of 18 U.S.C. §§ 1343 and 1346. In addition to conspiracy, the Indictment charges Weyhrauch with attempted interference with commerce by extortion induced under color of official right in violation of 18 U.S.C. § 1951(a), concerning programs receiving federal funds in violation of 18 U.S.C. § 666(a)(1)(b), and honest services mail fraud in violation of 18 U.S.C. §§ 1341 and 1346. Issues pertaining to honest services fraud are the subject of the pending motions.

The United States' trial brief indicated that it plans to introduce evidence pertaining to the charges of honest services fraud to show that in violation of Alaska law each defendant failed to disclose a conflict of interest arising from his dealings with VECO and its executives. At the final pre-trial conference on August 30, counsel for defendant Weyhrauch complained that this "failure to disclose" theory should not be presented to the jury, first, because it is an entirely new theory of liability, and second, because as a matter of law, there was no duty to disclose. The court directed the parties to file briefing on the matter as soon as possible.

The parties responded with commendable alacrity. Weyhrauch filed a motion at docket 193 seeking to exclude any argument that state statutes or legislative rules required disclosure of his dealings with VECO. The United States filed a motion at docket 195 seeking admission of evidence related directly to that argument and advocating the more general proposition that honest services fraud may be proved by showing the violation of a duty to disclose.

At docket 204, the United States filed a response to Weyhrauch's motion. At docket 205, Weyhrauch filed a response to the government's motion, and Kott did likewise at docket 206.

III. DISCUSSION

In the motion at docket 193, Weyhrauch asks the court to preclude the United States "from arguing or representing to the jury that state statutes or House rules required Weyhrauch 'to disclose' [his dealings with VECO]."[1] At docket 195, the United States describes the evidence whose admission it asks the court to approve as follows: (1) official legislative ethics publications found in each defendant's possession containing extracts from the Alaska State statutes and hypotheticals relating to their application; (2) a state employee's testimony that legislators customarily acknowledge conflicts, conflicts are officially recorded, but neither defendant disclosed a VECO conflict; (3) a state employee's testimony describing ethics training given to defendants; and (4) testimony showing Weyhrauch was on a legislative committee involved in preparing ethics publications. The United States would offer that evidence to show:

> that both defendants were under a legal duty to disclose to the Alaska State Legislature that they were soliciting and negotiating for jobs and other employment with VECO, and that they never made any such disclosures. Their failure to disclose that relationship is admissible in at least three ways: (1) to prove an intent to defraud through the deliberate concealment of a conflict

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[1] Doc. 193 at p. 1.

> of interest; (2) to prove an intent to defraud through the knowing violation of a state law; and (3) as consciousness of guilt concerning both defendants' use of their public office for their personal gain.[2]

It is readily apparent that all three of the government's theories supporting admission of the evidence depend upon the existence of a legally recognized duty to disclose the alleged conflict of interest. From the nature of the documents and testimony described (state ethics materials, state employee testimony about state ethics training and practices), it is also clear that the particular evidence which is the subject of the motion at docket 195 relates to a duty to disclose imposed by state, not federal, law. Of course, it is also the alleged state law duty that is the subject of Weyhrauch's motion.

Responding to Weyhrauch's motion, plaintiff points to AS 24.60.030(e)(3) as one source of such a duty. It provides that a legislator may not, "unless required by the Uniform Rules of the Alaska State Legislator, take or withhold official action or exert official influence that could substantially benefit or harm the financial interest of another person with whom the legislator is negotiating for employment." In the government's view, that is exactly what Kott and Weyhrauch were doing. However, the statute itself does not include any requirement for the disclosure of such negotiations; rather it simply prohibits certain conduct.

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[2] Doc. 184 at p. 19 (internal citations and explication of authorities cited omitted).

AS 24.60.30(e)(3) is part of a comprehensive series of statutes governing legislative conduct.[3] Within that series, there are several statutes which explicitly create a duty requiring legislators to disclose specific matters. AS 24.60.30(f) imposes an obligation to disclose membership on certain boards. AS 24.60.040 requires disclosure of participation in certain state contracts or leases. AS 24.60.050 imposes an obligation to disclose participation in non-exempt state programs and the receipt of non-exempt state loans. AS 24.60.070 requires a legislator to disclose "the formation or maintenance of a close economic association involving a substantial financial matter with"[4] a supervisor at work, another legislator, a registered lobbyist, or a legislative employee. AS 24.60.100 imposes an obligation to disclose information regarding the legislator's representation of another person before state agencies, boards, and commissions. Finally, AS 24.60.200 establishes a comprehensive scheme for reporting certain financial transactions.

The legislature clearly knows how to establish a duty to disclose and has done so in several instances. Its failure to include an explicit duty to disclose in AS 24.030(e)(3) is significant. Reading the relevant statutes as a whole, the court concludes that it would be inappropriate to imply a duty to disclose matters within the ambit of AS 24.030(e)(3).

The United States does not contend, nor does the court discern how, any of the disclosure obligations which actually do exist in state law would apply to

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[3] AS 24.60.010, *et seq.*

[4] AS 25.60.070(a).

the circumstances here. The government does contend that read in tandem with the Uniform Rules of the Alaska State Legislature ("Uniform Rules"), AS 24.60.030(e)(3) should be interpreted to impose a disclosure obligation. In particular, the United States relies on paragraph (b) of Uniform Rule 34. That rule governs legislative voting procedures in general. It includes a provision requiring roll call votes to be recorded and a detailed explanation of the use of the electronic voting machine. Paragraph (b) of the rule addresses abstention from voting:

> Abstention. Every member present in the house shall vote unless the house for special reasons permits a member to abstain. All motions excusing a member from voting shall be made before the house divides or before the call for the yeas and nays is commenced. A member requesting to be excused from voting may make a brief oral statement of the reasons for the request and the question of granting permission to abstain shall be taken without further debate. A member may not explain a vote, may not discuss the question while the yeas and nays are being called, and may not change a vote after the roll call result has been announced. Upon division and count of the house of any question a member who is not within the chamber may not be counted. A member may not be permitted to abstain except upon the unanimous consent of the membership.[5]

The rule does not impose a duty to disclose a conflict of interest. Rather, the rule provides a

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[5] Uniform Rules of the Alaska State Legislature 34(b).

procedure to be used when for any reason a legislator wishes to abstain. Given that neither AS 34.60.030(e)(3) nor Uniform Rule 34 separately creates a duty to disclose, the court is unable to conclude that when they are read together, a duty arises.

The government also contends that every legislator is subject to "an inherent fiduciary duty"[6] to avoid conflicts of interest and a concomitant duty to disclose such conflicts. These salutary propositions may have been recognized at common law, but in Alaska the legislature has decreed that the statutory provisions enacted in AS 24.60 "supersede the provisions of the common law relating to legislative conflict of interest that may apply to a member of the legislature or a legislative employee."[7] Thus, for purposes of Alaska law, a duty must be found in a statute.

The United States contends that there is a statute recognizing the fiduciary duty and a corresponding duty to disclose conflicts of interest. The statute relied upon is AS 24.60.010(2) in which the legislature declared:

> [A] fair and open government requires that legislators and legislative employees conduct the public's business in a manner that preserves the integrity of the legislative process and avoids conflicts or even appearances of conflicts of interest;

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[6] Doc. 204 at p. 3.

[7] AS 24.60.020(b).

This statute does create a duty, a duty to avoid conflicts or the appearance thereof. It does not, however, contain a provision requiring the disclosure of such conflicts. As with the other statutory provision relied upon by the United States, AS 34.60.010(2) is part of a comprehensive series of statutes governing the conduct of legislators,[8] a series which expressly addresses what a legislator must disclose and which does not mandate disclosure of either defendant's conflict on the facts present here.

Based on the preceding discussion, the court concludes that neither Weyhrauch nor Kott was subject to a duty created by State law to disclose his dealings with VECO and its executives. Thus, the court will grant the motion at docket 193 which asks the court to determine that state law imposes no such duty. The court will also deny the motion at docket 195 with respect to the specific evidence identified in the United States' papers, all of which has to do with a supposed state law duty to disclose.

There are two other topics illuminated in the briefing on which the parties disagree. One is the proposition advanced by the United States that the crime of honest services fraud may be proved by showing something other than an illegal financial transaction, and in particular by establishing that a public official knowingly concealed a conflict of interest.[9] The second is whether this theory of honest services fraud is something outside the

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[8] AS 24.60.010, *et seq.*

[9] Doc. 195 at p. 1.

original Indictment which was only disclosed to defendants on or about August 24, 2007.[10]

The court turns first to the question of whether the Indictment is sufficient to alert the defendants to the alternative theory of the crime. It is. In language common to Counts 6 and 7, it is alleged that the scheme underlying the wire fraud charge against Kott and the mail fraud charge against Weyhrauch was to deprive the State of Alaska of its right to honest services from each defendant "free from deceit, self-dealing, bias and **concealment**."[11]

Next, it is necessary to consider whether proof that a legislator knowingly concealed a conflict of interest in the course of discharging his duties may be used to support an honest services fraud conviction. The United States cites cases from several circuits which it says hold that it can. The court agrees that proof that an existing duty to disclose was violated may support an honest services fraud charge. However, as the court has already explained, Alaska law imposes no such duty with respect to the facts here. Thus, the government may proceed on the this theory in this case only if federal law may be used as the source of the duty to disclose. No federal statute is cited. The issue thus turns on whether federal common law may be used to provide the requisite duty to disclose.

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[10] In his memorandum at docket 194, August 24 is the date when Weyhrauch says the new charge was added. It is not clear why Weyhrauch points to August 24. The government's trial brief discussing the theory was filed on August 29.

[11] Doc. 2 at ¶ 87 (bold emphasis added).

In a case cited by the government, *United States v. Martin*,[12] the Seventh Circuit rejected the proposition that a fiduciary duty underlying an honest services fraud conviction must be established by state law. The Seventh Circuit's holding is directly contrary to the decision of the Fifth Circuit sitting *en banc* in *United States v. Brumley*[13] which held that any inherent duty must be found in State law.

This court finds the reasoning of the *Brumley* court very persuasive:

> We begin with the plain language of the statute. There are two words "honest" and "services." We will not lightly infer that Congress intended to leave to courts and prosecutors, in the first instance, the power to define the range and quality of services a state employer may choose to demand of its employees. We find nothing to suggest that Congress was attempting in § 1346 to garner to the federal government the right to impose on states a federal vision of appropriate services—to establish, in other words, an ethical regime for state employees. Such a taking of power would sorely tax separation of powers and erode our federalist structure. Under the most natural reading of the statute, a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law. Stated directly, the official must act or

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[12] 195 F.3d 961, 966 (7th Cir. 1999).

[13] 116 F.3d 728 (5th Cir. 1997) (*en banc*).

> fail to act contrary to the requirements of his job under state law.[14]

Further along in its opinion, the *en banc* court added this comment:

> We pause to put aside the frequent invocation of citizens' right to honest services. The reference to such "rights" of citizens has little relevant meaning beyond a shorthand statement of a duty rooted in state law and owed to the state employer. .Despite its rhetorical ring, the rights of citizens to honest government have no purchase independent of rights and duties locatable in state law. To hold otherwise would offer § 1346 as an enforcer of federal preferences of "good government" with attendant potential for large federal inroads into state matters and genuine difficulties of vagueness.[15]

While there is no Ninth Circuit case directly in point, this court does see in *Brumley* a reflection of the Ninth Circuit's expressed preference to confine mail fraud prosecutions to cases where there has been a breach of an independent duty to disclose to avoid sweeping "almost any illegal act within the province of the mail fraud statute."[16]

Although it recognized the cogent reasons advanced in *Brumley*, the *Martin* court offered no rebuttal. It simply stated that the holding in *Brumley* was contrary to Seventh Circuit precedent

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[14] *Id.* at p. 734.

[15] *Id.* at pp. 734-5 (internal citations omitted).

[16] *United States v. Dowling*, 739 F.2d 1445, 1450 (9th Cir. 1984), *rev'd on other grounds*, 473 U.S. 207 (1985).

and earlier decisions in some other circuits.[17] The cases cited in *Martin* from the Seventh Circuit itself are *United States v. Keane*[18] and *United States v. Bush*.[19] Neither *Keane* nor *Bush* contains any discussion of the issue and each simply cites a case from the Eighth Circuit and a case from the Fifth Circuit to support the conclusion that a violation of state law is not needed for the federal prosecution. Of course, the Fifth Circuit does not survive the en banc decision in *Brumley*, and the reasoning in the Eighth Circuit case is conclusory.[20]

The court has considered several other decisions cited by the United States which may sanction use of federal law as the source of an inherent duty to disclose, and finds them less persuasive than *Brumley*. One case cited by the government is *United States v. Woodward*.[21] It involved a legislator named Woodward who was convicted of mail and wire fraud for having accepted illegal gratuities from a lobbyist named Sawyer with the intent to deny his constituents his honest services as their representative. Among other things on appeal, Woodward challenged the sufficiency of the evidence. The First Circuit held that evidence of Woodward's intent was "also demonstrated by his failure to disclose his conflict of interest although he was

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17 195 F.3d at 966.

18 522 F.2d 534, 544-45 (7th Cir. 1975).

19 522 F.2d 641, 646 n.6 (7th Cir. 1975).

20 *United States v. States*, 488 U.S. 761, 767 (8th Cir. 1973).

21 149 F.3d 46 (1st Cir. 1998).

required to do so."[22] The appellate court pointed out that disclosure was specifically required by state statute. In *dictum*, it also noted that duty to disclose was inherent in a legislator's non-statutory fiduciary duty. The opinion does not make clear whether the inherent duty arises from state law or federal law. In any event, to support the inherent duty concept, the court cited its earlier decision regarding the very man who gave the gratuities to Woodward, *United States v. Sawyer*.[23] The only authority cited in *Sawyer* for the principle that there is an inherent duty is a still earlier first circuit case, *United States v. Silvano*,[24] where the court explained that the "affirmative duty to disclose material information arises out of a government's relationship to his or her employer, whether as a public or private employee."[25] Unfortunately, *Silvano* does not explain whether this fiduciary duty arises from state law or federal law. *Silvano* relied on the Seventh Circuit case, *United States v. Bush*,[26] for the proposition that there is such a fiduciary duty, but as previously discussed *Bush* offers no rationale.

Another case relied upon by the government, *United States v. Walker*, is from the Eleventh Circuit.[27] Walker was a Georgia legislator who also operated a variety of businesses. Among the 142

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[22] *Id.* at 62.

[23] 85 F.3d 713 (1st Cir. 1996).

[24] 812 F.2d 754 (1st Cir. 1987).

[25] *Id.* at 759.

[26] 552 F.2d 641 (7th Cir. 1975).

[27] 490 F.3d 1282 (11th Cir. 2007).

counts in the indictment were several counts of honest services mail fraud asserting that Walker and others "engaged in a scheme to misuse Walker's position as a state legislator for private gain by receiving business favors, including a contract to hire Georgia Personnel workers from Grady Memorial Hospital ("Grady") in return for Walker's help with legislation affecting Grady."[28] Walker was convicted on all but one of the charges involving Grady. Walker appealed the Grady convictions on the grounds that both the indictment and the evidence at trial were insufficient. Addressing the sufficiency of the evidence issue, the Eleventh Circuit referred to the inherent fiduciary duty of public officials citing its own earlier decision in *United States v. deVegter*[29] which in turn relies on *United States v. Lopez-Lukis*.[30] In neither did the Eleventh Circuit indicate whether the fiduciary duty is a creature of state law, or a doctrine derived from federal common law.

In the interest of space, suffice it to say that when one reads the cases cited by the United States and then goes some distance back through the chain of cases cited looking for reasons why federal law may be used to supply an inherent duty to disclose which supports an honest services fraud charge, one does not find any rationale sufficient to counter the reasoning in *Brumley*.

The court will follow *Brumley*. That means any duty to disclose sufficient to support the mail and wire fraud charges here must be a duty imposed by

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[28] *Id.* at 1287.

[29] 198 F.3d 1324 (11th Cir. 1999).

[30] 102 F.3d 1164 (11th Cir. 1997).

state law. As discussed above, in Alaska any common law fiduciary duty to disclose that might be owed by a legislator to the State as his employer has been abrogated and replaced by AS 24.60. That chapter of the Alaska statutes does not include a duty to disclose which could have been breached under the circumstances of this case. This leaves the United States to prove up the honest services fraud charges in this case based violations of the law other than a duty to disclose defendants' dealings with VECO.

IV. CONCLUSION

For the reasons set out above, the motion at docket 193 is **GRANTED**, and the motion at docket 195 is **DENIED**.

DATED at Anchorage, Alaska, this 4th day of September 2007.

/s/ JOHN S. SEDWICK
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-30339

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

BRUCE WEYHRAUCH,

Defendant-Appellee.

D.C. No. CR-07-00056-JWS
District of Alaska, Anchorage

ORDER

Before: D.W. NELSON, TASHIMA and FISHER, Circuit Judges.

The panel judges voted to deny appellants' petition for rehearing. Judge Fisher voted to deny the petition for rehearing en banc and Judge Nelson and Tashima so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellee's petition for rehearing and petition for rehearing en banc, filed December 9, 2008, is **DENIED**.

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff,

v.

Peter KOTT and Bruce WEYHRAUCH,
Defendants.

No. 3:07-cr-00056 JWS

Anchorage, Alaska

Wednesday, September 5, 2007

8:09 a.m.

STATUS CONFERENCE

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

ANCHORAGE, ALASKA – WEDNESDAY, SEPTEMBER 5, 2007

(Call to Order of The Court at 8:09 a.m.)

THE CLERK: All rise. His Honor the Court, the United States District Court for the District of Alaska is now in session, the Honorable John W. Sedwick presiding. Please be seated.

THE COURT: Good morning.

THE COUNSEL: Good morning, Your Honor.

THE COURT: We're here this morning for a conference in connection with a criminal case filed in Anchorage under the number 3:07-cr-56. The

purpose we're here is to explore the information contained in a recent filing by the United States, indicating that the United States is planning to take an appeal pursuant to 18 U.S.C. § 3731, or is at least contemplating doing so. I think we need to begin by learning what the United States' final position may be.

MR. MARSH: Thank you very much, Your Honor. Thank you for scheduling this on short time. The government appreciated the Court's willingness to engage in the briefing on this honest-services fraud theory so close to trial, and we appreciate all counsel pitching in and—and I think we all tried very hard to get to the law.

The government believes that, as I think even the Court recognized, the Ninth Circuit has not taken a position on this, on exactly what the contours of intangible rights theories are not relating to strict bribery theories. The government is prepared to—to appeal the Court's order at docket number 208, and we have gotten approval to do so from my management.

However the government also is cognizant of many of the Court's concerns that it's articulated in other orders about the need to get along with some of these cases, from—both from the interests of the defendants and also from the public's interest. And we're also very cognizant of the fact that the court has spent a lot of time and money bringing in jurors for this particular day.

Accordingly, when—when we look at the evidence, we think that the—the evidence concerning that theory of honest service—honest-services fraud, which the Court found was properly pled in the indictment, is highly relevant to both defendants.

However when looking at the specific statute, 24-60.03(e)(3), the government believes that it is of more relevance and more critical relevance to defendant Weyhrauch than it is to defendant Kott. Accordingly, at this time, the government is prepared to request that the Court reconsider defendant Weyhrauch's motion to sever. The government would non-oppose that.

* * *

OPPOSITION BRIEF

No. 08-1196

In the Supreme Court of the United States

BRUCE WEYHRAUCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, to convict a state official for depriving the public of its right to the defendant's honest services through the non-disclosure of material information, in violation of the mail-fraud statute (18 U.S.C. 1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 13

TABLE OF AUTHORITIES

Cases:

American Constr. Co. v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372 (1893) 11

Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 11

Cleveland v. *United States*, 531 U.S. 12 (2000) 7

Cobbledick v. *United States*, 309 U.S. 323 (1940) 13

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 11

McNally v. *United States*, 483 U.S. 350 (1987) 3, 7

United States v. *Bohonus*, 628 F.2d 1167 (9th Cir.), cert. denied, 447 U.S. 928 (1980) 4

United States v. *Brumley*, 116 F.3d 728, cert. denied, 522 U.S. 1028 (1997) 10

United States v. *Bryan*, 58 F.3d 933 (4th Cir. 1995), abrogated on other grounds by *United States* v. *O'Hagan*, 521 U.S. 642 (1997) 9

United States v. *Bush*, 522 F.2d 641 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976) 9

United States v. *Caldwell*, 302 F.3d 399 (5th Cir. 2002) 11

Cases—Continued: Page

United States v. *deVegter*, 198 F.3d 1324 (11th Cir. 1999), cert. denied, 530 U.S. 1264 (2000) 9

United States v. *Kemp*, 500 F.3d 257 (3d Cir. 2007), cert. denied, 128 S. Ct. 1329 (2008) 10

United States v. *Louderman*, 576 F.2d 1383 (9th Cir.), cert. denied, 439 U.S. 896 (1978) 4

United States v. *Mandel*, 591 F.2d 1347 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980) 8

United States v. *Margiotta*, 688 F.2d 108 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983) 8

United States v. *McNeive*, 536 F.2d 1245 (8th Cir. 1976) 8

United States v. *Murphy*, 323 F.3d 102 (3d Cir. 2003) 10

United States v. *Panarella*, 277 F.3d 678 (3d Cir. 2001), cert. denied, 537 U.S. 819 (2002) 9, 10

United States v. *Sawyer*, 239 F.3d 31 (1st Cir. 2001) 9

United States v. *Sorich*, 523 F.3d 702 (7th Cir. 2008), cert. denied, 129 S. Ct. 1308 (2009) 9

United States v. *Waymer*, 55 F.3d 564 (11th Cir. 1995), cert. denied, 517 U.S. 1119 (1996) 9

VMI v. *United States*, 508 U.S. 946 (1993) 11

Statutes:

18 U.S.C. 371 2

18 U.S.C. 666(a)(1)(B) 2

18 U.S.C. 1341 ..... 2, 3, 6, 7

18 U.S.C. 1346 ..... *passim*

18 U.S.C. 1951(a) 1

Statutes—Continued: Page

Alaska Stat. (2008):
§ 11.56.110 12
§ 24.60.030(e)(3) 10
Tex. Penal Code Ann. § 36.08(e) (West 2003) 10

In the Supreme Court of the United States

No. 08-1196

BRUCE WEYHRAUCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 548 F.3d 1237. The order and opinion of the district court (Pet. App. 22a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 2008. A petition for rehearing was denied on January 7, 2009 (Pet. App. 37a). The petition for a writ of certiorari was filed on March 25, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury sitting in the United States District Court for the District of Alaska returned an indictment charging petitioner with attempted extortion under color of official right, in violation of 18 U.S.C. 1951(a);

bribery concerning programs receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(B); honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346; and conspiracy to commit extortion, bribery, mail fraud and wire fraud, in violation of 18 U.S.C. 371. See Pet. App. 22a-23a. Before trial, petitioner moved to bar the introduction of evidence bearing on the existence of a duty of public officials to disclose conflicts of interest, and the government filed a motion seeking to permit introduction of the evidence. *Id.* at 23a-24a. The district court granted petitioner's motion and denied the government's motion. *Id.* at 22a-36a. The government took an interlocutory appeal, and the court of appeals reversed the district court's ruling and remanded the case for further proceedings. *Id.* at 1a-21a.

1. Petitioner, a lawyer, was a member of the Alaska House of Representatives during 2006, when the state legislature was considering legislation to alter how the State taxes oil production. According to the indictment, two executives of VECO Corp., an oil field services company, had a series of contacts with petitioner about the pending legislation. The indictment alleges that, by mail, telephone, and personal contact, petitioner solicited future legal work from VECO in exchange for voting on the oil tax legislation as VECO instructed. The indictment also alleges that petitioner offered, in his official capacity, to take other actions favorable to VECO in exchange for the legal work, such as maneuvering the legislation and reporting information about proposed changes in the legislation to the VECO executives. In May, June, and August 2006, petitioner introduced and voted on amendments to the oil tax legislation, as well as voted on the legislation itself. Petitioner never disclosed to the public or to other members of the

Alaska legislature that he was soliciting work from VECO while he was voting on legislation that affected the company. Pet. App. 2a-3a; Gov't C.A. Br. 6-12.

2. Based on his alleged misconduct, petitioner was charged with, among other crimes, mail fraud, in violation of 18 U.S.C. 1341 and 1346. Indictment paras. 87, 88, 90; Pet. App. 3a. Section 1341 prohibits the use of the mail to execute or to further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. After the Supreme Court held in *McNally* v. *United States*, 483 U.S. 350 (1987), that Section 1341 did not reach frauds involving deprivation of the intangible right of honest services, Congress enacted Section 1346, which defines the term "scheme or artifice to defraud" in Section 1341 to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346. In this case, the honest-services mail fraud count alleges that petitioner devised "a scheme and artifice to defraud and deprive the State of Alaska of its intangible right to [petitioner's] honest services * * * performed free from deceit, self-dealing, bias, and concealment," and that he attempted to execute the scheme by mailing his resume to VECO together with a cover letter soliciting employment. See Indictment paras. 87, 90; Pet. App. 3a.

3. Before trial, the government indicated that it anticipated introducing at trial evidence that petitioner had a duty under Alaska law to disclose his dealings with VECO. Pet. App. 23a. Petitioner filed a motion to exclude that evidence, and the government filed a cross-motion to admit it. *Ibid.* The district court concluded that, although state law created a duty to avoid conflicts of interest and the appearance of conflicts, it did not

require the disclosure of conflicts. *Id.* at 29a. The court then considered the government's argument that, even if Alaska law did not include a duty to disclose, the government could prove that petitioner committed honest-services mail fraud by proving that he violated a disclosure duty imposed by federal law. *Id.* at 30a-36a. The district court rejected that argument, stating that "any duty to disclose sufficient to support the mail * * * fraud charges here must be a duty imposed by state law." *Id.* at 35a-36a. Accordingly, the court granted petitioner's motion to exclude evidence of a state-law duty of disclosure and denied the government's motion to admit that evidence. *Id.* at 36a. Under the court's decision, the government was limited to proving the honest-services fraud charges against petitioner "based [on] violations of the law other than a duty to disclose [petitioner's] dealings with VECO." *Ibid.*

4. The government took an interlocutory appeal from the district court's pretrial ruling. The court of appeals rejected the district court's holding that conviction of a state official for "honest services mail fraud under 18 U.S.C. §§ 1341 and 1346 requires proof that the conduct at issue also violated an applicable state law." Pet. App. 1a. In support of its holding, the court of appeals first observed that, before *McNally*, it had construed the mail fraud statute to reach schemes involving the deprivation of the public's intangible right to a government official's honest services "without reference to any underlying state law duty." *Id.* at 15a (citing *United States* v. *Louderman*, 576 F.2d 1383, 1387 (9th Cir.), cert. denied, 439 U.S. 896 (1978), and *United States* v. *Bohonus*, 628 F.2d 1167, 1171 (9th Cir.), cert. denied, 447 U.S. 928 (1980)). Next, the court of appeals noted that it could not "find any basis in the text or legislative

history of § 1346 revealing that Congress intended to condition the meaning of 'honest services' on state law." *Id.* at 16a. The court reasoned that "conditioning mail fraud convictions on state law means that conduct in one state might violate the mail fraud statute, whereas identical conduct in a neighboring state would not." *Ibid.* The court determined that "Congress has given no indication it intended the criminality of official conduct under federal law to depend on geography." *Id.* at 16a-17a. Further, the court reasoned that, in enacting Section 1346, "Congress demonstrated a clear intent to reinstate the line of pre-*McNally* honest services cases," and that those cases "generally did not require state law to create the duty of honesty that public officials owe the public." *Id.* at 17a.

The court of appeals went on to observe that "federal action based on a valid constitutional grant of authority is not improper simply because it intrudes on state interests." Pet. App. 17a. The court explained that "Congress has a legitimate interest in ensuring that state action affecting federal priorities is not improperly influenced by personal motivations of state policymakers and regulators, and the happenstance of whether state law prohibits particular conduct should not control Congress' ability to protect federal interests through the federal fraud statutes, which are predicated on valid federal constitutional authority to regulate the mails." *Id.* at 18a (footnote omitted).

The court of appeals observed that traditionally two categories of conduct by public officials have been understood to support a conviction for honest-services fraud without reference to state law: "(1) taking a bribe or otherwise being paid for a decision while purporting to be exercising independent discretion; and (2) nondis-

closure of material information." Pet. App. 19a. The court noted that those two categories of honest-services fraud liability "ensure transparency, without which the public cannot determine whether public officials are living up to their duty of honesty." *Id.* at 20a. The court concluded that the allegations against petitioner "describe an undisclosed conflict of interest and could also support an inference of a quid pro quo arrangement to vote for the oil tax legislation in exchange for future remuneration in the form of legal work." *Ibid.* Because petitioner's alleged misconduct thus "falls comfortably within the two categories long recognized as the core of honest services fraud," the court determined that it "need not define the outer limits of public honest services fraud in this case." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 10-25) that a state official's non-disclosure of information does not amount to a scheme "to deprive another of the intangible right of honest services," in violation of 18 U.S.C. 1341 and 1346, absent a duty to disclose established by state law, and that this Court's review is warranted to resolve a conflict among the courts of appeals on that issue. The court of appeals, however, correctly rejected engrafting a state-law limiting principle onto the federal crime of honest-services mail fraud, and petitioner overstates any conflict among the circuits. In any event, this interlocutory appeal presents an inappropriate vehicle for resolving the question.

1. Section 1341 makes it a crime to use the mail to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."

18 U.S.C. 1341. Before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), the courts of appeals generally agreed that the mail fraud statute extended to schemes to deprive the public of the intangible right to the honest services of government officials. In *McNally*, the Court rejected the "intangible rights" theory of mail fraud, holding that the mail fraud statute in its then-existing form reached only schemes to deprive victims of money or property. *Id.* at 356, 358-359. The Court stated: "If Congress desires to go further, it must speak more clearly than it has." *Id.* at 360. In direct response, Congress enacted 18 U.S.C. 1346 to restore the pre-*McNally* understanding of the scope of the mail fraud statute. See *Cleveland* v. *United States*, 531 U.S. 12, 19-20 (2000). Section 1346 defines the term "scheme or artifice to defraud" in that statute to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

Contrary to petitioner's contention (Pet. 14-25), the court of appeals correctly rejected the district court's conclusion that conviction of a state official in "a federal honest services mail fraud prosecution under §§ 1341 and 1346 requires proof that the [official's] conduct * * * also violated an applicable state law." Pet. App. 1a. As the court of appeals explained, nothing in the text or legislative history of those provisions suggests that Congress intended to limit the federal prohibition against schemes that use the mail to deprive others of "honest services" to situations in which the defendant violates state law. *Id.* at 16a. Indeed, petitioner concedes that honest-services violations involving bribery or fraud do not require proof of a state-law violation, Pet. 15, and no greater textual basis exists for imposing

state-law limits on honest-services violations based on nondisclosure.

Nor is there any evidence that Congress intended the uniform federal honest-services prohibition to turn on separate state-law requirements, with the consequence that "conduct in one state might violate the mail fraud statute, whereas identical conduct in another state would not." Pet. App. 16a. Congress proscribed schemes to deprive others of "*the* intangible right of honest services," 18 U.S.C. 1346 (emphasis added), not a multiplicity of rights. "[T]he happenstance of whether state law prohibits particular conduct should not control Congress' ability to protect federal interests through the federal fraud statutes, which are predicated on valid federal constitutional authority to regulate the mails." Pet. App. 18a (footnote omitted).

The state-law duty theory is also inconsistent with the statutory origins of the honest-services prohibition. Contrary to petitioner's view (Pet. 10) that the court of appeals applied "federal common law" to determine the duties of state and local officials, "Congress demonstrated a clear intent to reinstate the line of pre-*McNally* honest services cases when it enacted § 1346." Pet. App. 17a. Section 1346 thus adopted those decisions as a matter of statutory law. And the pre-*McNally* courts were "uniformly of [the] opinion that the fact that a scheme to defraud may or may not violate state law does not determine whether the scheme is within the proscription of the mail fraud statute." *United States* v. *Mandel*, 591 F.2d 1347, 1361 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980). See, *e.g.*, *United States* v. *Margiotta*, 688 F.2d 108, 124 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); *United States* v. *McNeive*, 536 F.2d 1245, 1247

n.2 (8th Cir. 1976); *United States* v. *Bush*, 522 F.2d 641, 646 n.6 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976).

2. At least three courts of appeals, in addition to the Ninth Circuit in this case, have squarely rejected any requirement that an honest-services defendant have violated state law. The First Circuit has held that "there is no need to base [an honest-services] prosecution under § 1341 on allegations that the defendants violated state law." *United States* v. *Sawyer*, 239 F.3d 31, 41-42 (2001) (citation omitted). The Eleventh Circuit has also held that the duty to provide honest services may arise from sources other than state law, including the defendant's inherent fiduciary duty as a public official or the employment relationship itself. See *United States* v. *deVegter*, 198 F.3d 1324, 1328 (1999), cert. denied, 530 U.S. 1264 (2000); *United States* v. *Waymer*, 55 F.3d 564, 571 (1995), cert. denied, 517 U.S. 1119 (1996). And the Seventh Circuit as well recently rejected any requirement that the defendant have violated state law. See *United States* v. *Sorich*, 523 F.3d 702, 712 (2008), cert. denied, 129 S. Ct. 1308 (2009). See also *United States* v. *Bryan*, 58 F.3d 933, 940-941 (4th Cir. 1995), abrogated on other grounds by *United States* v. *O'Hagan*, 521 U.S. 642 (1997).

Contrary to petitioner's assertion (Pet. 11-12), the Third Circuit has not adopted a state-law limiting principle. In *United States* v. *Panarella*, 277 F.3d 678, cert. denied, 537 U.S. 819 (2002), the Third Circuit held that a public official's act of concealing a financial conflict of interest, "in violation of a [state] criminal disclosure statute," was sufficient to support an honest-services fraud conviction. *Id.* at 698-699. In a footnote, however, the court expressly reserved the question whether a violation of state law is necessary to establish a federal

honest-services fraud violation. *Id.* at 699 n.9. Subsequently, in *United States* v. *Murphy*, 323 F.3d 102 (3d Cir. 2003), the defendant urged the court to "address the issue [it had] reserved in [footnote 9] in *Panarella*," *id.* at 117, but the court found no need to do so, *ibid.* Thus, the Third Circuit has yet to resolve the issue.[1]

As petitioner notes (Pet. 11), the Fifth Circuit has interpreted Section 1346 to require the government, in an honest-services fraud prosecution of a state official, to prove that the defendant violated a duty "rooted in state law." *United States* v. *Brumley*, 116 F.3d 728, 734 (en banc), cert. denied, 522 U.S. 1028 (1997). But the isolated decision in *Brumley* does not justify this Court's review in this case. *Brumley* does not directly support petitioner's claim (Pet. 15-16) that an honest services violation predicated on non-disclosure requires proof a state-law duty of *disclosure*. The state-law violation in *Brumley* was not a disclosure violation, but was instead a prohibition against certain conduct that created a conflict of interest. See 116 F.3d at 735-736 (finding that Brumley violated a Texas criminal law, Tex. Penal Code § 36.08(e), making it a misdemeanor for a public official with judicial authority to accept a benefit from a person interested in a matter before the official or his tribunal). Petitioner does not insist on that sort of a requirement here. Indeed, petitioner concedes that no

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[1] In a more recent Third Circuit case, *United States* v. *Kemp*, 500 F.3d 257 (2007), cert. denied, 128 S. Ct. 1329 (2008), the defendants argued that the district court had erred in not instructing the jury that it had to find a violation of state criminal law. *Id.* at 283. The court of appeals rejected that claim because the district court had in fact so instructed the jury. *Ibid.* Because the defendants' actions violated state criminal law, the court did not decide whether a state-law violation was necessary.

such positive state-law prohibition is necessary to establish at least some categories of honest-services fraud. Pet. 15 ("Section 1346's criminalization of the denial of honest services obviously reaches those situations where an official, by fraud or bribery, fails to provide the required services."). Instead, petitioner seemingly limits his requirement of a state-law duty to "the distinct situation where the prosecution charges that the services rendered were dishonest because information material to the performance of official duties was not properly disclosed." *Ibid.* *Brumley* does not seem to be such a case, and, to the extent that it was, the court did not impose the requirement of a state-law *disclosure* duty that petitioner seeks. Accordingly, given the agreement of the majority of the courts that have addressed the issue that no state-law duty is required for an honest-services prosecution, and the distinguishable facts of *Brumley*, this Court's intervention is not warranted.[2]

3. In any event, the interlocutory posture of this case makes it an unsuitable vehicle for the Court to resolve the disagreement between the Fifth Circuit and the other courts of appeals. This Court generally declines to review interlocutory decisions. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893); see also *VMI* v.

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[2] In *United States* v. *Caldwell*, 302 F.3d 399, 409 (2002), the Fifth Circuit restated the holding of *Brumley* in a case involving a challenge to an indictment that alleged honest-services fraud based on a failure to disclose. The court had no occasion to apply the *Brumley* holding in that case, however, because the court held that violation of a state-law duty need not be alleged in the indictment. *Ibid.*

United States, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari).

That course of action is particularly appropriate here. The court of appeals did not rule definitively on the admissibility of the evidence that petitioner challenged, but instead remanded to the district court for it to address that issue under the standard announced in the court of appeals' opinion. Pet. App. 21a. The court of appeals "express[ed] no opinion on whether the professed evidence is relevant to proving the government's case under the standard we have announced." *Ibid.* In addition, petitioner has yet to face trial, and, if he is acquitted of the honest-services mail fraud charges, his present claim will be moot. Even if petitioner is convicted of mail fraud, his conviction may turn out to be based on conduct that violates Alaska law. The court of appeals recognized that the allegations in the indictment "could * * * support an inference of a quid pro quo arrangement to vote for the oil tax legislation in exchange for future remuneration in the form of legal work." *Id.* at 20a. Such conduct would violate Alaska Stat. § 11.56.110 (2008), which makes it a crime for a public official to solicit or to agree to accept a benefit in exchange for his vote or exercise of discretion. Also, petitioner may be convicted of mail fraud on the basis that he took official action that could have benefitted a person from whom he was seeking employment, conduct that is expressly prohibited by Alaska Statutes § 24.60.030(e)(3) (2008). Under either of those circumstances, his current claim (even if valid) would not entitle him to relief.

If, on the other hand, petitioner is convicted at trial on the basis of conduct that does not violate state law, and his conviction is affirmed by the court of appeals, he

will be free to renew his current claim in a fresh petition for a writ of certiorari at that time. The reversal by the court of appeals of the district court's pretrial ruling places petitioner in the same position that he would have occupied if the district court had ruled against him in the first instance—a ruling that would not have been subject to interlocutory review. See *Cobbledick* v. *United States*, 309 U.S. 323 (1940). In these circumstances, the Court should deny his petition at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

BRUCE WEYHRAUCH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The Ninth Circuit Clearly Held That The Disclosure Obligations Of State Officials Are To Be Governed By A Uniform Body Of Federal Common Law 2

II. There Is A Clear Split In The Circuits On This Question 4

III. The Interlocutory Posture Of This Case Offers No Reason To Decline Review Of The Ninth Circuit's Fully Articulated Holding 5

IV. This Case Is Made More Certworthy By The Court's Grant Of Review In *Black v. United States*, No. 08-876 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases

Bates v. United States, 522 U.S. 23 (1997) 5
Black v. United States, 530 F.3d 596 (7th Cir. 2008), *cert. granted*, 2009 WL 62169 (U.S. May 18, 2009) 7, 8, 9, 10, 11
Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691 (2003) 6
Clark v. Martinez, 543 U.S. 371 (2005) 10
Gregory v. Ashcroft, 501 U.S. 452 (1991) 10
Leocal v. Ashcroft, 543 U.S. 1 (2005) 9
Mazurek v. Armstrong, 520 U.S. 968 (1997) 7
Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14 (2004) 6
Oliver v. United States, 466 U.S. 170 (1984) 6
United States v. Brumley, 116 F.3d 728 (5th Cir. 1997) 4, 5
United States v. Gen. Motors Corp., 323 U.S. 373 (1945) 7
United States v. Harris, Nos. 06-50194, 06-50200, 06-50225, 2009 WL 497272 (9th Cir. Feb. 27, 2009) 6
United States v. Kincaid-Chauncey, 556 F.3d 923 (9th Cir. 2009) 6
United States v. Lopez, 514 U.S. 549 (1995) 7
United States v. Murphy, 323 F.3d 102 (3d Cir. 2002) 5
United States v. Panarella, 277 F.3d 678 (3d Cir. 2002) 9
United States v. Santos, 128 S. Ct. 2020 (2008) 10
United States v. Sorich, 523 F.3d 702 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 1308 (2009) 8, 9, 11

TABLE OF AUTHORITIES
(continued)

Page

United States v. Welch, 327 F.3d 1081 (10th Cir. 2003) 9

Statutes

18 U.S.C. § 1346 ..... *passim*
20 U.S.C. § 1097(a) 6
28 U.S.C. § 1441(a) 6

Miscellaneous

Brief in Opposition of United States, *Black v. United States*, No. 08-876 (U.S. Apr. 13, 2009), 2009 WL 1021542 8
Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*, 6 THEORETICAL INQ. L. 113 (2005) 11

ARGUMENT

Petitioner seeks certiorari on the question, squarely presented by a decision of the Ninth Circuit, whether 18 U.S.C. § 1346's extension of the federal fraud statutes to schemes to deny "the intangible right of honest services" mandates the creation of a federal common law defining the disclosure obligations of state government officials. There is a sharp split in the circuits on this issue, Pet. 10-14, and a substantial and growing volume of cases in the federal courts that turn upon it, *id.* at 25-26.

The decision below to derive criminally enforceable substantive disclosure obligations of state officials as a matter of federal common law flies in the face of this Court's extensive jurisprudence addressing the circumstances that justify federal common law making; the impropriety of unduly vague constructions of criminal statutes; the requirement of an unmistakably clear legislative statement to support judicial constructions impinging on sovereign state powers; and the rule of lenity dictating a narrow construction of ambiguous criminal statutes. Pet. 14-25.

Other than a single half-hearted assertion that the court below did not in fact require the meaning of "honest services" to be determined as a matter of federal common law, Opp. 8, the government does not directly address any of these points. Instead, it rewrites the question presented to avoid any reference to the court's clear holding that the nature of disclosures required by "honest services" is a matter of federal common law.

The government thus focuses only on the conclusion to which the Ninth Circuit's holding leads—that violation of a state law disclosure

requirement is not necessary in order to establish honest services fraud on the basis of a state official's nondisclosure. Addressing that issue rather than the one presented in the petition, the government seeks to minimize the conflict presented and argues that an interlocutory ruling to that effect does not merit this Court's attention. Opp. 6.

The notion that duties encompassed within the concept of "honest services" are to be determined as a matter of federal common law, rather than by reference to existing requirements found elsewhere in the law, is implicit, if not explicit, in most of the circuit court decisions interpreting § 1346. It is also at the root of much of the confusion and inconsistency that marks present jurisprudence construing that provision. Reviewing the Ninth Circuit's fully articulated holding on this point, including its express rejection of arguments to the contrary, would provide a unique opportunity to address the statute's confused state at a fundamental level. The Court should thus grant review of the question presented in the petition.

I. The Ninth Circuit Clearly Held That The Disclosure Obligations Of State Officials Are To Be Governed By A Uniform Body Of Federal Common Law

The decision below contains a definitive and unambiguous holding that the disclosure obligations of state officials whose breach may be subject to prosecution under 18 U.S.C. § 1346 are determined by a uniform body of federal common law. The district court examined the government's proffered evidence of Alaska state ethics provisions and practices, and concluded that "Alaska law imposes no [duty to disclose] with respect to the facts here." Pet.

App. 30a. Observing that "[n]o federal statute is cited," the court thus concluded that the government's ability to proceed with its non-disclosure evidence "turns on whether federal common law may be used to provide the requisite duty to disclose." *Id.* After extensive discussion of the case law bearing on that point, the district court announced that it would "follow [*United States v.*] *Brumley*," and answer that question in the negative. *Id.* at 35a.

Without questioning the district court's conclusions that no Alaska disclosure obligation was implicated by the alleged facts and that no federal provision had been invoked—issues not even raised on appeal by the government—the Ninth Circuit reversed. The court noted the approaches taken by the Fifth and Third Circuits, requiring a showing of "specific duties established by . . . law," *id.* at 12a, and also observed that the "majority of circuits . . . have held [to the contrary] that the meaning of 'honest services' is governed by a uniform federal standard inherent in 1346. . . ." *Id.* The court discussed at length the federalism and other concerns advanced by the Fifth and Third Circuits in rejecting a uniform federal rule independent of pre-existing legal requirements, but ultimately found them unpersuasive. *Id.* at 13a-15a.

The Ninth Circuit thus reversed the district court's refusal to rely on federal common law, holding "that 18 U.S.C. § 1346 establishes a uniform standard for 'honest services' that governs *every* public official and that the government does not need to prove an independent violation of state law to sustain an honest services fraud conviction." *Id.* at 21a (emphasis in original).

II. There Is A Clear Split In The Circuits On This Question

As the court below noted, Pet. App. 12a, most courts of appeals have proceeded on a clear, if often unstated, premise that the requirement of honest services is a directive to the federal courts to expound a uniform body of federal law. But, contrary to the government's suggestion that no circuit court has yet rejected the Ninth Circuit's position that a public official's disclosure duties are to be defined under federal common law, Opp. 9-11, both the Third and Fifth Circuits have squarely rejected the common law approach.

The government contends that the Fifth Circuit's opinion in *United States v. Brumley*, 116 F.3d 728 (1997) (en banc), "does not directly support" the petition because *Brumley* did not involve a violation of a public official's duty to disclose. The government gets the facts of *Brumley* correct, but misconstrues the opinion's significance. The defendant in *Brumley*, a judicial officer, was convicted under § 1346 for accepting benefits from persons who appeared before him. *See id.* at 731. In reviewing the conviction, the en banc Fifth Circuit categorically foreclosed the government from "impos[ing] upon states a federal vision of appropriate services—to establish, in other words, an ethical regime for state employees." *Id.* at 734. The court expressly rejected the notion that § 1346 announced "a common law crime." *Id.* at 732.

The government suggests that *Brumley*, limited to its facts, allows for the prosecution of public officials under § 1346 for violating *disclosure* duties mandated by federal common law. But such a distinction is directly at odds with the en banc

Brumley court's express rejection of a federal common law "ethical regime for state employees."

The government also argues that the Third Circuit has not yet rejected the common law approach. Opp. 9-10. The government points to language in *United States v. Murphy*, 323 F.3d 102 (3d Cir. 2002), purporting to leave the question open, but ignores the court's declaration, following a discussion of the fair notice and federalism concerns triggered by an open-ended reading of § 1346, that "[w]e thus endorse (and are supported by)" *Brumley*'s "stringent" interpretation of § 1346. *Id.* at 116. *Murphy* leaves no doubt that the Third Circuit requires evidence that the public official violated a "clearly established fiduciary relationship or legal duty in either federal or state law" to support a conviction under § 1346. *Id.* at 117.

III. The Interlocutory Posture Of This Case Offers No Reason To Decline Review Of The Ninth Circuit's Fully Articulated Holding

The government argues that the interlocutory posture of this case makes it an unsuitable vehicle for resolving this split in the circuits. But this Court not infrequently reviews non-final federal court decisions where, notwithstanding their interlocutory posture, the decision embodies a clear and fully articulated holding on an issue that otherwise merits the Court's attention.

The Court has undertaken interlocutory review in criminal cases where, as here, a ruling on a certworthy issue has cleared the way for a prosecution to proceed. *See, e.g., Bates v. United States*, 522 U.S. 23, 28-29 (1997) (granting review and affirming interlocutory decision that reversed dismissal of indictment and ruled that prosecution

under 20 U.S.C. § 1097(a) could proceed without an allegation of "intent to injure or defraud the United States"); *Oliver v. United States*, 466 U.S. 170, 174 (1984) (granting review and affirming interlocutory decision that prosecution could proceed based on discovery of marijuana located in field behind locked gate and no trespassing sign because the search was permissible under the open fields doctrine).

It has also done so in a broad array of civil cases. *See, e.g.*, *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 22 (2004) (granting review and reversing interlocutory decision allowing property loss suit to proceed unconstrained by liability limitations in bills of lading, contrary to applicable principles of federal maritime law); *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 694 (2003) (granting review and affirming interlocutory decision that an employee's FLSA action can be removed to federal court by the employer under 28 U.S.C. § 1441(a)).

The decision below embodies a thoroughly considered and fully articulated holding adopting a federal common law approach to interpretation of the honest services doctrine, and specifically addressing the arguments that have been offered for rejecting that position. The decision is recognized as the settled law of the circuit, *see United States v. Kincaid-Chauncey*, 556 F.3d 923, 947 (9th Cir. 2009) (Berzon, J., concurring); *United States v. Harris*, Nos. 06-50194, 06-50200, 06-50225, 2009 WL 497272, at *1 (9th Cir. Feb. 27, 2009) (unpublished), and will be binding on courts throughout the circuit to require application of a common law approach to cases brought under § 1346.

In addition to having consequences that are "fundamental to the further conduct of [this] case,"

United States v. Gen. Motors Corp., 323 U.S. 373, 377 (1945), the Ninth Circuit's decision has already "produced immediate consequences" with much broader significance. *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997). By sanctioning the prosecution of omissions to disclose that are fully consistent with Alaska law, the decision below "forecloses [Alaska] from experimenting and exercising [its] own judgment in an area to which States lay claim by right of history and expertise." *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring). The federal government's prosecution of petitioner for nondisclosure, which rides roughshod over Alaska's legislative ethics framework, is itself an intrusion on Alaska's sovereignty, whether or not a conviction is obtained ultimately on that count.

IV. This Case Is Made More Certworthy By The Court's Grant Of Review In *Black v. United States*, No. 08-876

An additional compelling reason to grant review at this time is the Court's recent decision to grant review in *Black v. United States*, 530 F.3d 596 (7th Cir. 2008), *cert. granted*, 2009 WL 62169 (U.S. May 18, 2009) (No. 08-876). In *Black*, this Court has before it an application of the deprivation of honest services doctrine arising from the conduct of private parties alleged to have improperly secured a private gain. Because the Court's decision in *Black* will likely have consequences in the cases more commonly brought against public officials—including those where no private gain is alleged—the Court's deliberations would be aided by simultaneous consideration of such a case.

At trial, the petitioners in *Black* sought an instruction that, for the government to prevail on its

honest services charge, the defendants' fraudulently obtained private gain must be at the expense of the party to whom the defendant owed his honest services—in that case, Hollinger International, of which they were senior executives. The *Black* petitioners argued that a denial of honest services cannot arise simply from their mischaracterization of money they received from Hollinger as payments for a bogus non-compete agreement, if the payments were otherwise proper. Specifically, they argued that the money was properly paid as compensation for management services rendered, so that Hollinger suffered no financial loss. Brief in Opposition of United States at 6, *Black v. United States*, No. 08-876 (U.S. Apr. 13, 2009), 2009 WL 1021542.

The Seventh Circuit rejected this contention, ruling that it would be no defense that the mischaracterized payments might arguably be justifiable as compensation for other services, and affirmed the conviction. *See Black*, 530 F.3d at 601.

It is notable that the Seventh Circuit is one of the handful of circuits which, like the Ninth Circuit, have overtly recognized that § 1346's honest services provision is a mandate for federal common law making. *See* Pet. 13. It is notable, too, that the doctrinal premise in *Black*—the Seventh Circuit's rule that private gain must be shown to establish honest services fraud—is itself acknowledged by that court to be an instance of federal common law making. *See United States v. Sorich*, 523 F.3d 702, 708 (7th Cir. 2008) (reaffirming private gain test while acknowledging criticism that it amounts to "judicial[] legislat[ion]"), *cert. denied*, 129 S. Ct. 1308 (2009). This premise that private gain must be proven to establish a denial of honest services has been explicitly rejected by several courts of appeals,

see United States v. Welch, 327 F.3d 1081, 1107 (10th Cir. 2003); *United States v. Panarella*, 277 F.3d 678, 691-92 (3d Cir. 2002), and the Seventh Circuit itself has noted that its "private gain limitation has not been adopted by other circuits." *Sorich*, 523 F.3d at 708.

Accordingly, the specific question presented in *Black* arises only after the resolution of two antecedent and more fundamental questions: Is the meaning of honest services a matter of federal common law, as the Ninth and Seventh Circuits have held? And if so, is the Seventh Circuit's private gain test a proper exercise of that power?

A grant of review in the present case would focus this Court's attention on the ultimate premise that § 1346 is a mandate for open-ended federal common law making. By addressing this premise directly, this Court will go a long way toward clarifying the meaning of "honest services" and the sources from which its meaning is to be derived. Attention to these issues will be illuminating for the Court's consideration of *Black*, where the question presented focuses on one narrow doctrinal question and presupposes the correctness of a federal common law approach.

In addition, while the narrow doctrinal question presented in *Black* about private gain and loss arises directly in a relatively small proportion of honest services cases confronted by the federal courts, the implications of the Court's holding will likely be felt far more broadly.

It is of course essential to "interpret a statute consistently" across all areas of its application. *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 n.8 (2005). To give the same statutory terms "a different meaning

for each category [of application] would be to invent a statute rather than interpret one." *Clark v. Martinez*, 543 U.S. 371, 378 (2005); *see United States v. Santos*, 128 S. Ct. 2020, 2030 (2008) (plurality opinion). Accordingly, the Court's consideration of the narrow question presented in *Black* must be undertaken with awareness of the possible consequences the decision may have in other contexts. This is especially true of the statute's more common application to honest services fraud by public officials, including prosecutions, like the present one, based on nondisclosures but no private gain.

In particular, cases like the present one—a prosecution of a state legislator for failure to disclose conversations with a private party with an interest in pending legislation—should be borne in mind because of the unique federalism considerations they present. Prosecutions of state officials for denial of the right of honest services raise the question of just what obligations of honesty those officials owe to their governments and citizens. An open-ended power of the federal courts to define those obligations as a matter of federal common law, rather than looking to existing legal requirements and especially duties under state law, raises a serious question of invading the "substantial sovereign powers" of the states. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); Pet. 22.

More specifically, Alaska has made an express policy decision in favor of a model of governance by a part-time, citizen-legislature, and has intentionally adopted rules to facilitate the ability of such legislators to earn outside income, and to avoid imposing burdens that would discourage citizens from seeking government service. *See* Pet. 7 n.1. In that choice, Alaska acts on sound footing, well within the prerogatives allowed it under our federal

structure. *See* Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*, 6 THEORETICAL INQ. L. 113, 120-22 (2005). The decision below that the federal courts, not the sovereign states, will define the disclosure obligations of state officials whose violation may be punished as a federal felony, is thus a severe affront to our federal structure.

In sum, this Court's first encounter with the problems presented by § 1346's "honest services" provision will be greatly aided by dealing at the outset with the fundamental, conceptual wrong turn taken by most courts at the beginning of the inquiry. A decision to hear this case thus will be especially beneficial in the context of the Court's review of *Black*, where the Seventh Circuit's candid invocation of common law, in creating a private gain test and rejecting any state law limiting principle, *see Sorich*, 523 F.3d at 708, is an aspect of the holding below that the petitioners in *Black* do not even challenge.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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June 5, 2009

JOINT APPENDIX

139

Supreme Court, U.S.
FILED
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(4)

No. 08-1196

IN THE

Supreme Court of the United States

BRUCE WEYHRAUCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 25, 2009
CERTIORARI GRANTED JUNE 29, 2009

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TABLE OF CONTENTS

Docket, *United States v. Weyhrauch*, No. 07-30339 (9th Cir.) 1

Docket, *United States v. Kott*, No. 3:07-cr-00056-JWS-JDR-2 (D. Alaska) 4

Indictment, *United States v. Kott*, No. 3:07-cr-00056-JWS-JDR (D. Alaska, filed May 3, 2007) 11

United States' Motion *In Limine* to Introduce Evidence of Defendants' Duty to Disclose, Failure to Disclose, and Violations of State Law Concerning Their Negotiations for Employment with "Company A," *United States v. Kott*, No. 3:07-cr-00056-JWS-JDR, (D. Alaska, filed Aug. 30, 2007) 38

Memorandum in Support of Defendant Weyhrauch's Motion *In Limine* for Order, Re: Disclosure Under State Law, *United States v. Kott*, No. 3:07-cr-00056-JWS-JDR (D. Alaska, filed Aug. 30, 2007) 52

United States' Memorandum in Response to Weyhrauch's Memorandum at Docket No. 194 Concerning Honest Services Fraud, *United States v. Kott*, No. 3:07-cr-00056-JWS-JDR (D. Alaska, filed Sept. 1, 2007) 66

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-30339

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

BRUCE WEYHRAUCH, DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
02/04/2008	11	Filed original and 15 copies of Appellant USA's opening brief of 34 pages, with 5 excerpts of record in 1 volume (Informal: No); served on 2/1/08. [07-30339] (HC)
* * * * *		
04/17/2008	17	Filed original and 15 copies of Appellee Bruce Weyhrauch answering brief of 67 pages. Supplemental Excerpts of record in 01 volumes. Served on 04/17/2008. (GN)
* * * * *		
05/22/2008	20	Filed original and 15 copies of Appellant USA (Informal: No) reply brief of 15 pages. Served on 05/21/2008. (GN)

DATE	DOCKET NUMBER	PROCEEDINGS
* * * * *		
08/04/2008	30	ARGUED AND SUBMITTED TO DOROTHY W. NELSON, A. WALLACE TASHIMA and RAYMOND C. FISHER. (DR)
* * * * *		
11/26/2008	38	FILED OPINION (DOROTHY W. NELSON, A. WALLACE TASHIMA and RAYMOND C. FISHER) REVERSED AND REMANDED. Judge: DWN, Judge: AWT, Judge: RCF Authoring. FILED AND ENTERED JUDGMENT. (PH)
* * * * *		
12/10/2008	43	Filed original and 50 copies of Appellee Bruce Weyhrauch petition for panel rehearing and petition for rehearing en banc. Number of Pages 16. Served on 12/08/2008. Deficiency: None. Date circulated to the court: 12/11/2008. (PANEL—ACTIVE JUDGES—ANY INTERESTED SENIOR JUDGES) (SW)
01/07/2009	44	Filed order (DOROTHY W. NELSON, A. WALLACE

DATE	DOCKET NUMBER	PROCEEDINGS
		TASHIMA and RAYMOND C. FISHER): Appellee's petition for rehearing and petition for rehearing en banc, filed December 9, 2008, is DENIED. (AF)
* * * * *		
07/06/2009	49	Received notice from the Supreme Court. Petition for certiorari GRANTED on 06/29/2009. Supreme Court Number 08-1196. [6982942] (SW)

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA (ANCHORAGE)

No. 3:07-cr-00056-JWS-JDR-2

UNITED STATES OF AMERICA, PLAINTIFF

v.

KOTT, ET AL., DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
05/03/2007	1	UNREDACTED INDICTMENT (NOT FOR PUBLIC) as to Peter Kott (1) count(s) 1, 2, 4, 6, Bruce Weyhrauch (2) count(s) 1, 3, 5, 7. (NKD, COURT STAFF) (Entered: 05/03/2007)
* * * * *		
08/30/2007	191	Minute Entry for proceedings held before Judge John W. Sedwick: Final Pretrial Conference as to Peter Kott and Bruce Weyhrauch held on 8/30/2007. Plaintiff's oral motion for production of Rule 16 discovery GRANTED. Defendant Weyhrauch's oral motion to produce draft agreements

DATE	DOCKET NUMBER	PROCEEDINGS
		DENIED. Jurors excused for cause. Defendants Kott and Weyhrauch's conditions of release remain as previously set. (Court Recorder AMK.) Government Counsel—James Goeke and Nicholas Marsh; Defense Counsel—James Wendt, Margaret Simonian, Ray Brown, and Douglas Pope; Defendants Present On Bond (telephonic). cc: JC, USM, USPO. (AMK, COURT STAFF) (Entered: 08/30/2007)
08/30/2007	193	MOTION shortened time re in limine on disclosure by Bruce Weyhrauch. (Attachments: # 1 Proposed Order) (Pope, Douglas) (Entered: 08/30/2007)
08/30/2007	194	MEMORANDUM *in support of motion for shortened time on motion in limine* by Bruce Weyhrauch 193 MOTION shortened time re in limine on disclosure filed by Bruce Weyhrauch (Pope, Douglas) (Entered: 08/30/2007)

DATE	DOCKET NUMBER	PROCEEDINGS
08/30/2007	195	MOTION in Limine *on Shortened Time* by USA as to Peter Kott, Bruce Weyhrauch. (Attachments: # 1 Proposed Order) (Bottini, Joseph) (Entered: 08/30/2007)
* * * * *		
09/01/2007	204	RESPONSE in Opposition by USA as to Peter Kott, Bruce Weyhrauch re 193 MOTION shortened time re in limine on disclosure (Bottini, Joseph) (Entered: 09/01/2007)
09/01/2007	205	RESPONSE in Opposition by Bruce Weyhrauch re 195 MOTION in Limine (Pope, Douglas) (Entered: 09/01/2007)
09/04/2007	208	ORDER denying 195 Motion in Limine permitting admission of certain evidence as to Peter Kott (1), Bruce Weyhrauch (2); granting 193 Motion to exclude certain evidence as to Bruce Weyhrauch (2). Signed by Judge John W. Sedwick on 9/4/07. (GMM, COURT

DATE	DOCKET NUMBER	PROCEEDINGS
		STAFF) (Entered: 09/04/2007)
* * * * *		
09/05/2007	216	NOTICE OF APPEAL (Interlocutory) by USA as to Bruce Weyhrauch re 208 Order on Motion for Miscellaneous Relief, Order on Motion in Limine. Filing fee $ 455. (Bottini, Joseph) (Entered: 09/05/2007)
09/05/2007	217	Minute Entry for proceedings held before Judge John W. Sedwick: Status Conference as to Peter Kott and Bruce Weyhrauch held on 9/5/2007. Plaintiff's oral motion to stay proceedings as to defendant Weyhrauch GRANTED; plaintiff to file a Status Report re progress of the appeal on the last day of November 2007 and the last day of every month thereafter until the appeal has been determined by the Ninth Circuit. Plaintiff's oral motion to reconsider defendant Weyhrauch's Motion to Sever at Docket 117 GRANTED. Defendant Kott

DATE	DOCKET NUMBER	PROCEEDINGS
		and Weyhrauch's conditions of release remain as previously set. (Court Recorder AMK.) Government Counsel—Nicholas Marsh and James Goeke; Defense Counsel—James Wendt, Margaret Simonian, Ray Brown, and Douglas Pope; Defendant Present On Bond. cc: USM, USPO. (AMK, COURT STAFF) (Entered: 09/05/2007)
	* * * * *	
09/17/2007	246	USCA Case Number as to Bruce Weyhrauch CV-07-30339 for 216 Notice of Appeal—Interlocutory filed by USA. (CEA, COURT STAFF) (Entered: 09/17/2007)
09/24/2007	269	DESIGNATION OF RECORD ON APPEAL by USA as to Bruce Weyhrauch re 216 Notice of Appeal—Interlocutory cc: ECRO (RMC, COURT STAFF) (Entered: 09/26/2007)
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
10/26/2007	282	TRANSCRIPT of Proceedings as to Peter Kott, Bruce Weyhrauch; Final Pretrial Conference held on 8/30/07 before Judge John W. Sedwick. Court Recorder: AMK. This transcript is available for review in the Clerk's Office in Anchorage, Alaska. (AMK, COURT STAFF) (Entered: 10/26/2007)
10/26/2007	283	TRANSCRIPT of Proceedings as to Peter Kott, Bruce Weyhrauch; Status Conference held on 9/5/07 before Judge John W. Sedwick. Court Recorder: AMK. This transcript is available for review in the Clerk's Office in Anchorage, Alaska. (AMK, COURT STAFF) (Entered: 10/26/2007)
* * * * *		
11/26/2008	350	Opinion of USCA as to Bruce Weyhrauch re 216 Notice of Appeal—Interlocutory REVERSED and REMANDED. (SAL2, COURT STAFF) (Entered: 11/26/2008)

DATE	DOCKET NUMBER	PROCEEDINGS
* * * * *		
01/07/2009	354	ORDER of USCA as to Bruce Weyhrauch Appellees petition for rehearing and petition for rehearing en banc is DENIED. (SAL2, COURT STAFF) (Entered: 01/07/2009)

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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT ALASKA

UNITED STATES OF AMERICA Plaintiff, vs. PETER KOTT, Defendant, and BRUCE WEYHRAUCH, Defendant.	)	No. COUNT 1: CONSPIRACY TO COMMIT EXTORTION UNDER COLOR OF OFFICIAL RIGHT, BRIBERY, AND HONEST SERVICES MAIL AND WIRE FRAUD Vio. 18 U.S.C. § 371

) COUNT 2:
) INTERFERENCE
) WITH COMMERCE
) BY EXTORTION
) INDUCED UNDER
) COLOR OF
) OFFICIAL RIGHT
) **(KOTT)**
) Vio. 18 U.S.C.
) § 1951(a) and § 2
) COUNT 3:
) ATTEMPTED
) INTERFERENCE
) WITH COMMERCE
) BY EXTORTION
) INDUCED UNDER
) COLOR OF
) OFFICIAL RIGHT
) **(WEYHRAUCH)**
) Vio. 18 U.S.C.
) § 1951(a) and § 2
) COUNT 4:
) BRIBERY
) CONCERNING
) PROGRAMS
) RECEIVING
) FEDERAL FUNDS
) **(KOTT)**
) Vio. 18 U.S.C.
) § 666(a)(1)(B) and
) § 2
) COUNT 5:
) BRIBERY
) CONCERNING

) PROGRAMS
) RECEIVING
) FEDERAL FUNDS
) **(WEYHRAUCH)**
) Vio. 18 U.S.C.
) § 666(a)(1)(B) and
) § 2
) COUNT 6:
) HONEST SERVICES
) WIRE FRAUD
) **(KOTT)**
) Vio. 18 U.S.C.
) §§ 1343, 1346 and
) § 2
) COUNT 7:
) HONEST SERVICES
) MAIL FRAUD
) **(WEYHRAUCH)**
) Vio. 18 U.S.C.
) § 1341, 1346 and
) § 2

INDICTMENT

The Grand Jury charges that:

COUNT ONE

CONSPIRACY TO COMMIT EXTORTION UNDER COLOR OF OFFICIAL RIGHT, BRIBERY, AND HONEST SERVICES MAIL AND WIRE FRAUD (18 U.S.C. § 371)

General Allegations

At all times material to this Indictment:

1. PETER KOTT (hereinafter "KOTT") was an elected member of the Alaska House of Representatives. KOTT represented District 17, located in Eagle River, Alaska. KOTT was first elected to the Alaska House of Representatives in 1992. KOTT served in the House of Representatives until January 2007. From January 1, 2003 to December 31, 2004, KOTT served as the Speaker of the House.

2. Kott's Hardwood Flooring was an Alaska-based business in which KOTT was a part-owner and operator.

3. BRUCE WEYHRAUCH (hereinafter "WEYHRAUCH") was an elected member of the Alaska House of Representatives. WEYHRAUCH represented District 4, located in Juneau, Alaska. WEYHRAUCH was first elected to the Alaska House of Representatives in 2002. WEYHRAUCH served in the House of Representatives until January 2007. WEYHRAUCH is an attorney licensed to practice in the State of Alaska.

4. A company known to the grand jury but unnamed (hereinafter referred to as "COMPANY A") was a privately held company that was incorporated in a State other than the State of Alaska. COMPANY A was a multinational corporation that provided services to the energy, resource, and process industries and to the public sector. COMPANY A was comprised of multiple subsidiary companies and, collectively, COMPANY A was engaged in interstate commerce in connection with the foregoing projects, including the construction of a prison located in Barbados.

5. At various times, the Alaska State Legislature had issues and matters under consideration that had a business impact on COMPANY A. Therefore, COMPANY A and its principals took an active interest in the Alaska State Legislature's consideration of those issues and matters.

6. COMPANY CEO was the Chief Executive Officer and part-owner of Company A. COMPANY CEO was a resident of Alaska.

7. COMPANY VP was the Vice President for Government Relations of Company A. COMPANY VP was a resident of Alaska.

8. State Senator A was an elected member of the Alaska State Senate. State Senator A's term as a member of the Alaska State Senate ended in January, 2007.

9. Polling Company was a business with offices in Anchorage, Alaska, that provides polling services for political campaigns.

10. Suite 604 was a hotel suite in Juneau, Alaska, rented by COMPANY A and used by COMPANY CEO, COMPANY VP, and others.

ALASKA'S INTRA-STATE NATURAL GAS PIPELINE PROPOSAL

11. Beginning in or around 2005, the State of Alaska was involved in negotiations with representatives of three oil companies (collectively, the "oil producers") concerning the construction of a natural gas pipeline from Alaska's North Slope. The agreement to build the proposed gas pipeline must ultimately be approved by the Alaska State Legislature.

12. The construction of the gas pipeline was important to COMPANY A. COMPANY A was primarily an oil field services company, and a significant source of COMPANY A's income was derived from contracts with the oil producers in Alaska.

13. On or about February 21, 2006, the Governor of the State of Alaska (hereinafter "Governor") announced that the state had reached an agreement with the primary oil producers regarding the construction of a gas pipeline. The terms of the agreement concerning construction of the pipeline were not announced or released at that time. Instead, the Governor announced that the agreement with the oil producers included a provision that addressed a significant change to the manner in which the State of Alaska taxes oil production. If the Alaska State Legislature did not approve the proposed change in the manner in which oil production was taxed by the state, then the agreement concerning construction of the gas pipeline would not take effect.

14. Shortly after that announcement, the Governor's administration proposed legislation relating to the negotiated change in the taxation of oil production. The newly proposed tax system—referred to as a "petroleum production tax" or "PPT"—would be based upon a percentage of the producer's net profits, or revenues minus capital and operating expenditures. Under the proposed system agreed to by the state, the producers would pay a 20 percent tax rate and receive a 20 percent tradable tax credit. The negotiated tax formula—referred to generally as the "20/20" PPT tax rate—was the

subject of much debate throughout the 2006 regular and special sessions of the Alaska State Legislature. COMPANY A supported the 20/20 PPT tax rate legislation, and opposed legislation that contained a tax rate of greater than 20/20.

THE CONSPIRACY

15. Beginning in or about September 2005 and continuing until on or about August 30, 2006, in the District of Alaska and elsewhere, defendants PETER KOTT and BRUCE WEYHRAUCH, each an elected public official of the Alaska State Legislature, together with COMPANY CEO, COMPANY VP, State Senator A, and others both known and unknown to the grand jury, did knowingly and unlawfully conspire, confederate, and agree together and with each other:

(A) to obstruct, delay, and affect in any way and degree commerce and the movement of any article and commodity in commerce by extortion, that is, to unlawfully obtain or attempt to obtain under color of official right money or other property from COMPANY A, COMPANY CEO, and COMPANY VP with their consent for KOTT and WEYHRAUCH, not due KOTT or WEYHRAUCH or each official's office, in agreement for the performance of official acts, in violation of Title 18, United States Code, Section 1951(a);

(B) to corruptly solicit and demand for the benefit of any person, and accept and agree to accept, anything of value from any person for KOTT and WEYHRAUCH each while an agent for the State of Alaska, an entity that received more than $10,000 in federal funding during the calendar years 2005 and 2006, with the intent that KOTT and

WEYHRAUCH would each be influenced and rewarded in connection with any business, transaction or series of transactions of $5,000 or more of the State of Alaska, in violation of Title 18, United States Code, Section 666(a)(1)(B); and

(C) to devise, intend to devise, and attempt to devise a scheme and artifice to defraud and deprive the State of Alaska of its intangible right to honest services and for the purpose of executing the scheme and artifice, to knowingly transmit and cause to be transmitted writing and sounds by communications in interstate commerce by means of wire, and to knowingly send and cause to be sent communications in the United States mails, in violation of Title 18, United States Code, Sections 1341, 1343, and 1346.

OBJECTS OF THE CONSPIRACY

16. It was an object of the conspiracy for KOTT to solicit, and for COMPANY CEO and COMPANY VP to provide, money and other financial benefits in exchange for KOTT agreeing to perform, being influenced in performing, and ultimately performing official acts as a member of the Alaska State Legislature, for the purpose of furthering COMPANY A's business within the State of Alaska.

17. It was a further object of the conspiracy for KOTT to solicit, and for COMPANY CEO and COMPANY VP to agree to provide, employment for KOTT with COMPANY A after KOTT left his position as a member of the Alaska State Legislature. It was a further goal of the conspiracy for WEYHRAUCH to solicit, and for COMPANY CEO and COMPANY VP to agree to provide, employment and contract legal work for WEYHRAUCH with the

COMPANY after WEYHRAUCH left his position as a member of the Alaska State Legislature.

18. It was a further object of the conspiracy for KOTT to make interstate wire communications, and for WEYHRAUCH to utilize the United States mails, in connection with a scheme and artifice to defraud the State of Alaska of its intangible right to the honest services of KOTT and WEYHRAUCH by receiving and attempting to receive things of value from COMPANY CEO, COMPANY VP, and COMPANY A.

MANNER AND MEANS OF THE CONSPIRACY

19. In return for the money and other things of value that KOTT received and attempted to receive, and that WEYHRAUCH attempted to receive, KOTT and WEYHRAUCH each agreed to perform, attempted to perform, and actually performed official acts as a member of the Alaska State Legislature that benefited COMPANY CEO, COMPANY VP, and COMPANY A and its clients. Among other things and without limitation, KOTT and WEYHRAUCH each performed the following acts to execute the conspiratorial agreement: (1) voting in favor of versions of the PPT bill supported by COMPANY CEO, COMPANY VP, COMPANY A, and the oil producers; (2) lobbying other elected public officials to support versions of the PPT bill that COMPANY CEO, COMPANY VP, COMPANY A, and the oil producers favored; and (3) offering to assist and help COMPANY CEO, COMPANY VP, and COMPANY A by providing official support for the natural gas pipeline legislation and the PPT bill.

20. With respect to KOTT, the co-conspirators effected the conspiracy by providing KOTT with

illegal financial benefits through cash payments to KOTT and through inflated invoices prepared by Kott's Hardwood Flooring. The co-conspirators further effected the scheme through KOTT's demand for, and COMPANY A's agreement to provide KOTT with a job as a lobbyist after KOTT left the Alaska State Legislature. These things of value were in return for KOTT's agreement to perform, attempt to perform, and eventual performance of official acts to benefit COMPANY A.

21. With respect to WEYHRAUCH, the co-conspirators effected the scheme by agreeing to provide WEYHRAUCH with contractual legal work for COMPANY A, in response to WEYHRAUCH's written solicitation for such work from COMPANY A. In return, WEYHRAUCH worked with KOTT, COMPANY CEO, and COMPANY VP to agree to perform, attempt to perform, and ultimately perform official acts to benefit COMPANY A.

OVERT ACTS

22. In furtherance of the conspiracy, and to effect its objects, the co-conspirators committed the following overt acts, among others, in the District of Alaska and elsewhere:

23. On or about September 26, 2005, KOTT called COMPANY VP and said, "I need a job," to which COMPANY VP replied, "You've got a job, get us a pipeline."

24. On or about September 26, 2005, in a subsequent conversation, in discussing the PPT tax issue and the natural gas pipeline legislation, KOTT again told COMPANY VP, "I just want to be the warden in Barbados," to which COMPANY VP replied that he wanted the "gas pipeline."

25. In or about November, 2005, in a discussion between KOTT and COMPANY VP about whether another State Representative would support the anticipated gas pipeline legislation, KOTT agreed that he would "just get [that State Representative] on line" to support the pipeline.

26. On January 8, 2006, prior to the start of the 2006 regular legislative session, KOTT called COMPANY CEO and left him a message that stated: "Things start tomorrow. I just wanted to get what our instructions are."

27. On January 10, 2006, in a telephone call, KOTT assured COMPANY CEO that KOTT would deliver the gas pipeline legislation for COMPANY CEO as follows:

KOTT:	I'm going to get this fucking gas line done so I can get out of here.
COMPANY CEO:	Get the gas, get the gas.
KOTT:	That's my commitment to you, so.
COMPANY CEO:	Okay.
KOTT:	I'll get her done.
COMPANY CEO:	And I'll do the same thing to you.

28. On or about February 20, 2006, in a discussion between COMPANY CEO and COMPANY VP about COMPANY A's influence over KOTT, COMPANY CEO admitted that "[w]e got more money in PETE KOTT than he can even think about it."

29. On or about March 10, 2006, KOTT, using his cellular telephone to place a call from Washington,

D.C., where KOTT was having dinner with an oil executive, to COMPANY VP, KOTT told COMPANY VP, "Well, you know where my allegiance is, so you know, just . . . You're my best buddy, so you can count on it. . . . [T]hat's the reason why I call you on this shit, all right? So you fill me in on some of this shit that I'm not aware of, so I appreciate that."

30. On or about March 23, 2006, WEYHRAUCH called COMPANY A and left a message with COMPANY CEO's secretary that WEYHRAUCH wanted to speak with COMPANY CEO about the oil and gas tax and other development issues.

31. On or about March 27, 2006, COMPANY CEO, COMPANY VP, and two other executives from COMPANY A agreed to make contributions to support one of KOTT's relatives in a local school board race, and explicitly discussed that such contributions would help COMPANY A gain influence with KOTT.

32. On or about March 29, 2006, KOTT met with COMPANY VP and COMPANY CEO in Suite 604 and described how KOTT had attempted to gain leverage over another member of the Alaska State Legislature by placing a "hold" on a bill that was important to that state legislator, and how KOTT hoped to use that leverage to get support for COMPANY A's preferred version of the PPT tax bill.

33. On or about March 29, 2006, in the same meeting described above, KOTT further told COMPANY CEO that KOTT would not release the "hold" until COMPANY CEO instructed KOTT to do so.

34. On or about April 18, 2006, KOTT met with COMPANY VP in Suite 604 and told COMPANY

VP—and COMPANY CEO, via teleconference—that KOTT had been successful in getting other legislators' support for the oil tax legislation, and that KOTT believed the oil tax would pass the legislature.

35. On or about April 18, 2006, in the same meeting described above, KOTT explicitly linked his support of the gas pipeline and PPT tax issues with his receipt of things of value from COMPANY A, as KOTT told COMPANY VP and COMPANY CEO, "You'll get your gasline, the governor gets his bill, and I'll get my job in Barbados."

36. On or about May 4, 2006, and while the Alaska State Legislature was in session, WEYHRAUCH mailed and caused to be mailed through the United States mails a resume and cover letter to COMPANY CEO in which WEYHRAUCH offered to provide legal services and representation to COMPANY A.

37. On or about May 4, 2006, during a conversation in Suite 604, COMPANY CEO, COMPANY VP, and a lobbyist discussed the fact that WEYHRAUCH had solicited COMPANY CEO for legal work with COMPANY A, but that the matter should not be discussed outside Suite 604.

38. On or about May 4, 2006, during a conversation in Suite 604, COMPANY CEO and COMPANY VP discussed whether COMPANY A should hire WEYHRAUCH, and agreed that they believed WEYHRAUCH's job solicitation was connected to whether or not WEYHRAUCH would support COMPANY A's preferred version of the PPT tax bill.

39. On or about May 4, 2006, during the same conversation in Suite 604, COMPANY CEO and

COMPANY VP agreed that, in response to WEYHRAUCH's job solicitation, they would tell WEYHRAUCH to meet with COMPANY CEO in Anchorage after the legislative session ended to discuss the possibility of providing COMPANY A legal work to WEYHRAUCH.

40. On or about May 5, 2006, during a conversation between KOTT and COMPANY VP, KOTT asked COMPANY VP "are we going to get WEYHRAUCH?," and told COMPANY VP that WEYHRAUCH had told KOTT that WEYHRAUCH had applied for a legal position with COMPANY A.

41. On or about May 5, 2006, after WEYHRAUCH called COMPANY CEO and told COMPANY CEO that the state legislators needed to "hold the line" on the 20/20 PPT tax rate, COMPANY CEO stated, "When session is over you need to come up and talk to me"—to which WEYHRAUCH replied, "I'll do that right away."

42. On or about May 7, 2006, in a meeting with COMPANY CEO and COMPANY VP in Suite 604 about KOTT's continued efforts to support the 20-percent-tax version of the PPT legislation, KOTT admitted that if it were not for COMPANY CEO, KOTT would be supporting a much higher 30 percent tax for the PPT bill.

43. On or about May 7, 2006, after WEYHRAUCH had mistakenly voted the "wrong way" on an amendment to the PPT bill that COMPANY A and the oil producers did not support, WEYHRAUCH switched his vote relating to the amendment after receiving instructions to do so from KOTT and COMPANY CEO.

44. On or about May 7, 2006, after the amendment described in paragraph 43, above, was defeated, KOTT met with COMPANY CEO and COMPANY VP in Suite 604 and described how KOTT had lied to another member of the Alaska State Legislature in order to kill the amendment as follows: "I got [COMPANY CEO] [pointing to one side of him], I got [the other state legislator] [pointing to the other side]. . . I use 'em and abuse 'em."

45. On or about May 7, 2006, in the same meeting in Suite 604, KOTT admitted that the reason he sought to defeat the amendment was because COMPANY CEO asked him to do so as follows: "I had to get 'er done. So, I had to come back and face this man right here [pointing to COMPANY CEO]. I had to cheat, steal, beg, borrow, and lie." In response, COMPANY CEO told KOTT, "I own your ass."

46. On or about May 8, 2006, KOTT and WEYHRAUCH had a telephone call with COMPANY VP in which KOTT and WEYHRAUCH gave COMPANY VP a status update regarding the PPT bill, and discussed how to maneuver the 20/20 PPT bill through both the House and the Senate—including talking to Senator A about the issue.

47. On or about May 8, 2006, KOTT went to Suite 604 to give COMPANY CEO and COMPANY VP an update on the PPT bill, and told COMPANY CEO and COMPANY VP that KOTT was concerned about whether WEYHRAUCH would support the PPT 20 percent tax version.

48. On or about May 8, 2006, in a conversation between COMPANY CEO and WEYHRAUCH about the PPT tax version, although WEYHRAUCH told

COMPANY CEO that WEYHRAUCH thought a 21 percent tax was a "political reality," WEYHRAUCH told COMPANY CEO that WEYHRAUCH would follow KOTT and cast his vote alongside KOTT's vote.

49. On or about May 9, 2006, in a conversation between COMPANY CEO and COMPANY VP in Suite 604, COMPANY CEO told COMPANY VP that they would have to give WEYHRAUCH some contract legal work if the 20 percent PPT bill passed the Alaska State Legislature.

50. On or about May 16, 2006, COMPANY CEO sent an e-mail to multiple members of the Alaska State Legislature, including KOTT and WEYHRAUCH, in which COMPANY CEO asked each member to vote for the 20 percent PPT bill.

51. On or about May 19, 2006, WEYHRAUCH sent COMPANY CEO a reply e-mail that stated in part, "I will be arriving in Anchorage on Wednesday May 24 and would like to meet with you at 4 pm to discuss a mutually beneficial relationship."

52. On or about May 19, 2006, WEYHRAUCH called COMPANY A and, through COMPANY CEO's secretary, scheduled a meeting between WEYHRAUCH and COMPANY CEO on May 24, 2006.

53. On or about May 24, 2006, in preparing for a meeting that afternoon with WEYHRAUCH, COMPANY CEO and COMPANY VP agreed that they needed WEYHRAUCH's vote on the PPT legislation, and decided to "string [WEYHRAUCH] out for a while" and "stall a little bit" before providing WEYHRAUCH with legal contract work from COMPANY A.

54. On or about May 24, 2006, WEYHRAUCH, COMPANY VP and COMPANY CEO met for several hours at a restaurant at a hotel in Anchorage, Alaska, and discussed, among other things, WEYHRAUCH's request for employment with COMPANY A and WEYHRAUCH's support of the 20 percent PPT legislation.

55. On or about May 24, 2006, during the same meeting with COMPANY CEO and COMPANY VP, WEYHRAUCH told COMPANY CEO that WEYHRAUCH was not doing well financially.

56. On or about May 25, 2006, COMPANY VP told a lobbyist for one of the oil producers that COMPANY CEO had met with WEYHRAUCH the evening before; that the relationship with WEYHRAUCH was "going well"; that COMPANY A was keeping WEYHRAUCH in a good place; and that "BRUCE will be good."

57. On or about May 30, 2006, WEYHRAUCH, in a handwritten note to COMPANY CEO on Alaska State Legislature letterhead, stated, "It was great to finally spend some time with you and [COMPANY VP] last week. Call anytime. I look forward to working with you and COMPANY A in the future."

58. On or about June 1, 2006, in Suite 604, COMPANY CEO handed KOTT approximately $1,000 in cash.

59. On or about June 1, 2006, during the same meeting in Suite 604 described above, when KOTT told COMPANY CEO that KOTT wanted to be a lobbyist after leaving the Alaska State Legislature, COMPANY CEO told KOTT, "Well, you will be."

60. On or about June 4, 2006, during a special session of the Alaska State Legislature, KOTT and WEYHRAUCH worked together to seek an adjournment of the June 4, 2006, session of the Alaska House of Representatives before a vote could be taken on an amendment to the PPT bill that COMPANY A and the producers did not support.

61. On or about June 5, 2006, WEYHRAUCH told COMPANY VP that the PPT bill appeared to be coming along poorly, and that it was "real frustrating" given what WEYHRAUCH had done to try to further COMPANY A's interests concerning the PPT bill.

62. On or about June 5, 2006, in a telephone conversation between State Senator A and COMPANY CEO concerning the PPT bill, State Senator A and COMPANY CEO agreed that WEYHRAUCH came to support the version of the PPT bill favored by COMPANY A because COMPANY CEO told him that COMPANY A would give WEYHRAUCH some legal work.

63. Between on or about June 4, 2006 and June 6, 2006, KOTT met multiple times with COMPANY VP and COMPANY CEO to discuss "killing" a version of the PPT bill that was unfavorable to COMPANY CEO, and to discuss KOTT coordinating his actions with State Senator A.

64. On or about July 12, 2006, COMPANY VP and KOTT had a telephone conversation in which they discussed whether KOTT's campaign manager had told KOTT that COMPANY A had hired Polling Company to conduct a poll for KOTT.

COMPANY VP: [KOTT's campaign manager] told you about the [Polling Company] poll, right?

KOTT: Yeah.

COMPANY VP: I talked to [Polling Company] today, it's all square and if you need to do something you know later we're in on that too. So, I told those two guys, [KOTT's campaign manager] and [Polling Company], to get a hold of you if you need to do something, talk about it and we'll take care of that too. Okay?

KOTT: All right.

65. On or about July 12, 2006, COMPANY VP spoke with Polling Company and arranged for Polling Company to conduct a poll for KOTT's campaign for re-election to the Alaska State Legislature, but to bill COMPANY A—through COMPANY VP—for the cost of KOTT's poll.

66. On or about July 12, 2006, Polling Company prepared an invoice for a poll for KOTT's re-election campaign, but addressed the invoice to COMPANY VP.

67. Between on or about July 12, 2006, and on or about August 30, 2006, COMPANY A wrote a $2,750 check to Polling Company to pay the invoice referenced in ¶ 66.

68. On or about July 19, 2006, during a telephone conversation, WEYHRAUCH told COMPANY VP that his "mission" was to "shoe-horn[]" himself into a

meeting of legislators that were studying a new proposal for the PPT bill, learn about the details of the new PPT proposal, and then to report those details to COMPANY VP and COMPANY CEO.

69. On or about July 22, 2006, during a telephone conversation between COMPANY VP and PETE KOTT, KOTT and COMPANY VP acknowledged that they both had spoken to WEYHRAUCH about the new PPT proposal.

70. On or about July 30, 2006, COMPANY VP told KOTT that the results of the poll would be sent to KOTT later that day, and confirmed that COMPANY A—not KOTT or KOTT's campaign—paid for the cost of the poll.

71. On or about July 31, 2006, after learning from KOTT that KOTT needed money, COMPANY CEO and COMPANY VP discussed how they could get money to KOTT:

COMPANY CEO: [KOTT] needs more money, I think.

COMPANY VP: Uh, I'll talk to PETE about it, okay? He's supposed to get with me in the next, oh, couple of hours (unintelligible).

COMPANY CEO: Well, we've got to figure out a way to get, uh, his son some money, and I don't know exactly how to do that.

COMPANY VP: Well, I'll talk to PETE about it.

COMPANY CEO: Okay.

72. On or about July 31, 2006, COMPANY CEO and KOTT discussed how to come up with a "foolproof" plan to get KOTT the additional money.

73. On or about August 2, 2006, COMPANY VP directed an employee of COMPANY A to pay a fraudulently inflated invoice, totaling $7,993, sent to COMPANY A on behalf of Kott's Hardwood Flooring.

74. Between on or about August 2, 2006 and on or about August 30, 2006, a check for $7,993—dated July 31, 2006, and drawn from COMPANY CEO's personal bank account—was deposited into a bank account related to Kott's Hardwood Flooring.

75. On or about August 23, 2006, WEYHRAUCH, in a letter to COMPANY CEO that was prepared on Alaska State Legislature letterhead, stated in part, "I mentioned to [COMPANY VP] that if you and he are available to get together to discuss pipeline or any other development issues, I would be pleased to accommodate your schedules."

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

INTERFERENCE WITH COMMERCE BY EXTORTION INDUCED UNDER COLOR OF OFFICIAL RIGHT
(18 U.S.C. § 1951(a) and § 2)
(DEFENDANT PETER KOTT)

76. Paragraphs 1-14 and 22-75 of Count One are realleged and incorporated by reference as though fully set forth herein.

77. Between in or about September 2005 and on or about August 30, 2006, in the District of Alaska and elsewhere, the defendant,

PETER KOTT,

an elected member of the Alaska State Legislature, did knowingly obstruct, delay and affect in any way and degree commerce and the movement of articles and commodities in interstate commerce by extortion, as those terms are defined in Title 18, United States Code, Section 1951; that is, KOTT unlawfully obtained and attempted to obtain from COMPANY CEO, COMPANY VP, and COMPANY A, with KOTT's consent under color of official right, $8,993 in monetary payments, $2,750 in polling expenses, and a future contract as a lobbyist for COMPANY A, not due KOTT or his office, in agreement that KOTT would perform official acts in exchange for the monetary payments from COMPANY CEO, COMPANY VP, and COMPANY A.

All in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT THREE

ATTEMPTED INTERFERENCE WITH COMMERCE BY EXTORTION INDUCED UNDER COLOR OF OFFICIAL RIGHT
(18 U.S.C. § 1951(a) and § 2)
(DEFENDANT BRUCE WEYHRAUCH)

78. Paragraphs 1-14 and 22-75 of Count One are realleged and incorporated by reference as though fully set forth herein.

79. Between in or about March 2006 and on or about August 30, 2006, in the District of Alaska and elsewhere, the defendant,

BRUCE WEYHRAUCH,

an elected member of the Alaska State Legislature, did knowingly attempt to obstruct, delay, and affect

in any way and degree commerce and the movement of articles and commodities in interstate commerce by extortion, as those terms are defined in Title 18, United States Code, Section 1951; that is, WEYHRAUCH unlawfully attempted to obtain from COMPANY CEO, COMPANY VP, and COMPANY A, with WEYHRAUCH's consent under color of official right, a future contract to perform legal work for COMPANY A, not due WEYHRAUCH or his office, in agreement that WEYHRAUCH would perform official acts in exchange for the future contract to perform legal work from COMPANY CEO, COMPANY VP, and COMPANY A.

All in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT FOUR

BRIBERY CONCERNING PROGRAMS RECEIVING FEDERAL FUNDS
(18 U.S.C. § 666(a)(1)(B) and § 2)
(DEFENDANT PETER KOTT)

80. Paragraphs 1-14 and 22-75 of Count One are realleged and incorporated by reference as though fully set forth herein.

81. In calendar years 2005 and 2006, the State of Alaska received in excess of $10,000 from the United States government under Federal programs involving grants, subsidies, loans, guarantees, insurance, and/or other forms of Federal assistance.

82. Between in or about September 2005 and on or about August 30, 2006, in the District of Alaska and elsewhere, the defendant,

PETER KOTT,

an elected member of the Alaska State Legislature and an agent of the government of the State of Alaska, did knowingly and corruptly solicit, demand, accept, and agree to accept something of value from COMPANY CEO, COMPANY VP, and COMPANY A, intending to be influenced and rewarded in connection with a business, transaction, or series of transactions of $5,000 or more of the State of Alaska.

All in violation of Title 18, United States Code, Sections 666(a)(1)(B) and 2.

COUNT FIVE

BRIBERY CONCERNING PROGRAMS RECEIVING FEDERAL FUNDS
(18 U.S.C. § 666(a)(1)(B) and § 2)
(DEFENDANT BRUCE WEYHRAUCH)

83. Paragraphs 1-14 and 22-75 of Count One are realleged and incorporated by reference as though fully set forth herein.

84. In calendar year 2006, the State of Alaska received excess of $10,000 from the United States government under Federal programs involving grants, subsidies, loans, guarantees, insurance, and/or other forms of Federal assistance.

85. Between in or about March 2006 and on or about August 30, 2006, in the District of Alaska and elsewhere, the defendant,

BRUCE WEYHRAUCH,

an elected member of the Alaska State Legislature and an agent of the government of the State of Alaska, did knowingly and corruptly solicit, demand, and agree to accept something of value from

COMPANY CEO, COMPANY VP, and COMPANY A, intending to be influenced and rewarded in connection with a business, transaction, or series of transactions of $5,000 or more of the State of Alaska.

All in violation of Title 18, United States Code, Sections 666(a)(1)(B) and 2.

COUNTS SIX AND SEVEN

HONEST SERVICES MAIL AND WIRE FRAUD (18 U.S.C. §§ 1341, 1343, and 1346 and § 2) (DEFENDANTS PETER KOTT AND BRUCE WEYHRAUCH)

86. Paragraphs 1-14 and 22-75 of Count One are realleged and incorporated by reference as though fully set forth herein.

The Scheme

87. Between in or about September 2005 and on or about August 30, 2006, in the District of Alaska and elsewhere, the defendants, **PETER KOTT** and **BRUCE WEYHRAUCH**, along with COMPANY CEO and COMPANY VP, aided and abetted by one another, devised, attempted to devise, and intended to devise a scheme and artifice to defraud and deprive the State of Alaska of its intangible right to the honest services of KOTT and WEYHRAUCH, performed free from deceit, self-dealing, bias, and concealment.

The Purpose of the Scheme

88. The purpose of the scheme was for COMPANY CEO and COMPANY VP to provide, or agree to provide, things of value to KOTT and WEYHRAUCH to cause KOTT and WEYHRAUCH each to abuse his position and office as a member of the Alaska State Legislature, and to misuse his official authority for

the benefit of COMPANY CEO, COMPANY VP and COMPANY A.

Use of the Mails and Interstate Wires

89. For the purpose of executing the scheme and artifice to defraud, in the District of Alaska and elsewhere, KOTT did knowingly transmit and cause to be transmitted certain sounds and signals by means of interstate wire, as set forth below:

COUNT	DATE	INTERSTATE WIRE COMMUNICATION
6	March 10, 2006	Call placed by KOTT from Washington, D.C., to COMPANY VP in Alaska, to discuss legislation before the Alaska State Legislature and to affirm KOTT's commitment to COMPANY VP

90. For the purpose of executing and attempting to execute the scheme and artifice to defraud, in the District of Alaska and elsewhere, WEYHRAUCH did knowingly place and cause to be placed in a post office and authorized depository for mail matter or used a private interstate commercial carrier, the matter and things listed below to be sent and delivered by the United States Postal service or commercial carrier:

COUNT	DATE	ITEM MAILED OR DELIVERED
7	May 4, 2006	Resume and cover letter soliciting a position of employment from COMPANY A

All in violation of Title 18, United States Code, Sections 1341, 1343, 1346, and 2.

A TRUE BILL.

s/ Grand Jury Foreperson
GRAND JURY FOREPERSON

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. PETER KOTT and BRUCE WEYHRAUCH Defendants	)	No. 3:07-cr-JWS-JDR **UNITED STATES' MOTION *IN LIMINE* TO INTRODUCE EVIDENCE OF DEFENDANTS' DUTY TO DISCLOSE, FAILURE TO DISCLOSE, AND**

) **VIOLATIONS OF**
) **STATE LAW**
) **CONCERNING**
) **THEIR**
) **NEGOTIATIONS**
) **FOR EMPLOYMENT**
) **WITH "COMPANY**
) **A"**
)

The United States, by and through undersigned counsel, hereby moves *in limine* for an order specifically allowing the government to present evidence of both defendant Kott's and defendant Weyhrauch's negotiation of future employment with "Company A," each defendant's duty (both express and implied) as Alaska State Legislators to disclose such negotiations, each defendant's failure to disclose such negotiations, and each defendant's failure to cease voting on particular legislation as required under Alaska state law. As set forth below, such evidence is admissible to prove that Kott and Weyhrauch each violated their respective duties of honest services by knowingly concealing their respective conflicts of interests from the Alaska State Legislature and from the citizens of the State of Alaska, and by voting on legislation that impacted the company with whom they were negotiating for employment.

EVIDENCE TO BE PRESENTED

Unless precluded by the Court, the government intends to introduce evidence showing a knowing concealement of a conflict of interest by each

defendant, as well as evidence demonstrating a violation of Alaska state law by each defendant, in connection with each defendant's solicitation and negotiation of employment with Company A. The evidence on these issues will consist of the following:

(1) ethics publications produced and distributed by the Alaska State Legislature and found in each defendants' possession that contain verbatim excerpts of various Alaska State statutes addressing conflicts of interest and disclosure requirements as well as hypothetical factual scenarios addressing the statutes;

(2) testimonial evidence from a state employee whose duties include tracking such information, who will testify that: (a) members of the Alaska State Legislature customarily acknowledge the existence of conflicts of interests on the floor of the Legislature; (b) the clerk of each legislative body is required to record such conflict declarations when they occur; and (c) the official records of the Alaska State Legislature demonstrate that neither Kott nor Weyhrauch ever disclosed that they were negotiating for employment with Company A at any time during 2005 and 2006;

(3) testimonial evidence from a state employee describing the ethics training that both Kott and Weyhrauch underwent as Alaska State Legislators and noting that both attended such trainings and received the previously noted ethics publications; and

(4) testimonial evidence that Weyhrauch served on the Select Committee on Ethics in the Alaska State Legislature, which instructed state legislators on their ethical requirements and which played a role in preparing and distributing ethics publications to state legislators.

This evidence goes directly to the United States' proof of the honest services prong of the conspiracy charged in Count I, as well as the substantive honest services charges in Count VI and Count VII of the Indictment.

ARGUMENT

I Honest Services Fraud May Be Proven By Evidence Other than a Bribe.

In the present case, Weyhrauch is charged with failing to perform the duties of his public office "free of deceit, self-dealing, bias and concealment." Indictment ¶ 87. During the pretrial conference before the Court, counsel for Weyhrauch argued that neither the Indictment nor settled law permitted the government to prove Count VI or Count VII of the Indictment by any evidence *other than* the existence of an illegal financial transaction. The government respectfully disagrees on both counts.

All parties will likely agree that the Ninth Circuit's jurisprudence on honest services fraud is not particularly well-developed. *See, e.g., United States v. Frega*, 179 F.3d 793 (9th Cir. 1999). However, seven other United States Courts of Appeal have recognized that honest services fraud charges may be proven in at least two additional ways: (1) through proof that the public official knowingly concealed the existence of a conflict of interest; or (2) through proof that the public official knowingly violated a state law.

Taken together, these cases make clear that the public is entitled not just to the right *decisions* by its elected officials, but also to a free and uncorrupted *process* by which those public officials take official actions. When a public official fails to disclose the existence of a conflict of interest or violates a state law in connection thereto, that public official can be found guilty of honest services fraud irrespective of whether the public official took *any* act thereafter, much less a fraudulent or harmful act.

The First Circuit has consistently recognized that a defendant's knowing violation of a state law (criminal or otherwise) can serve as the basis for a federal prosecution for mail or wire fraud. *United States v. Woodward*, 149 F.3d 46, 62 (1st Cir. 1998). That court has further held that "the nondisclosure of a conflict of interest is a second way in which a public official can steal his honest services." *Id.*; *see also United States v. Sawyer*, 239 F.3d 31, 40 (1st. Cir 2001) ("We have recognized that this duty of disclosure arises not exclusively by statute, but also from the general fiduciary duty a public official owes to the public.")

The Eleventh Circuit has adopted a similar position, holding that honest services fraud charges are properly brought where a state official, irrespective of the existence of state law, knowingly conceals the existence of a conflict of interest. *United States v. Walker*, 490 F.3d 1282, 1297 (11th Cir. 2007); *see also United States v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) ("A public official's undisclosed conflict of interest . . . does by itself harm the constituents' interest in the end for which the official serve—honest government in the public's best

interest."); *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) ("[e]lected officials generally owe a fiduciary duty to the electorate").

The Seventh Circuit has also upheld honest services fraud convictions that were predicated solely on a defendant's intentional breach of a duty to disclosure. *See United States v. Bush*, 522 F.2d 641, 646 (7th Cir. 1975) (upholding an honest services conviction even though "[t]here is no concrete evidence of extortion, bribery, [or] kickbacks"). Although the Seventh Circuit has recognized that violations of state law *can* be relevant to proving honest services fraud, *see United States v. Segal*, — U.S. —, 2007 WL 2200507 at *6 (7th Cir. Aug. 2, 2007) (noting that "state laws are useful for defining the scope of fiduciary duties" for honest services fraud charges), the Seventh Circuit has also explicitly rejected the "argument . . . that the fiduciary duty the breach of which is charged as mail fraud must have its source in state law." *United States v. Martin*, 195 F.3d 961, 966 (7th Cir. 1999).

The Fourth Circuit has also upheld honest services fraud convictions based on a defendant's failure to disclose the existence of relationships that led to a conflict of interest. *See United States v. Mandel*, 591 F.2d 1347, 1355 (4th Cir. 1979), *aff'd in relevant part*, 602 F.2d 653 (*en banc*), *cert,. denied*, 445 U.S. 961 (1980) (mail fraud statute violated by public officials' "fail[ure] to disclose" their intertwining financial relationships). *Mandel*, a pre-*McNally* decision, was recently cited approvingly by *United States v. Bryan*, 58 F.3d 933, 942 (4th Cir. 1994), *abrogated on other*

grounds by United States v. O'Hagan, 521 U.S. 642 (1997).[1]

The Fifth and the Eighth Circuits have also each held that an honest services fraud conviction can be based on a defendant's knowing violation of a state law—criminal or otherwise. In *United States v. Jennings*, 487 F.3d 564 (8th Cir. 2007), the Eighth Circuit affirmed an honest services fraud conviction based on the defendant's transgression of a Minnesota state provision regulating conduct of its elected public officials. *Id.* at 578 (statute required disclosure by "[a] public official . . . who in the discharge of official duties would be required to take an action or make a decision that would substantially affect the official's financial interests or those of an associated business"). Similarly, in *United States v. Brumley*, 116 F.3d 728, 733-34 (5th Cir. 1997) (en banc), the Fifth Circuit held that honest services fraud charges must be based on a violation of state law, but specifically declined to extend that to state *criminal* law. *Id.* Even these circuits, however, have occasionally recognized the relevance of knowing concealment of financial relationships as a basis for showing honest services fraud. *See United States v. Blumeyer*, 114 F.3d 758, 766 (8th Cir. 1997) (upholding the defendant's conviction pursuant to §§ 1341 and 1346 and concluding that the

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[1] At least one additional circuit appears likely to adopt a similar holding. *United States v. Espy*, 989 F.Supp. 17, 25 (D.D.C.1997), rev'd in part on other grounds, 145 F.3d 1369 (D.C.Cir.1998) ("The law in this Circuit does not require allegations that a quid pro quo or selling of office is necessary for the indictment to support charges for honest services fraud.").

representative's "position as a state legislator involved significant discretion, and the jury reasonably could have concluded that the defendants schemed to deprive Missourians of [the representative's] honest services by appropriating his discretion for the benefit of [defendant's company], a company in which [the defendant] concealed his interest").

Finally, the Third Circuit has also allowed concealment-based honest services fraud prosecutions. *See United States v. Antico*, 275 F.3d 245, 264 (3d Cir. 2001) ("one of the meanings that fraud bears in the [mail fraud] statute . . . includes the deliberate concealment of material information in a setting of fiduciary obligation. A public official is a fiduciary toward the public . . . .") (internal citation and quotation marks omitted). In the Third Circuit, the underlying state disclosure duty must come from a state *criminal* law. *See United States v. Panarella*, 277 F.3d 678, 692-93 (3d Cir. 2002) (affirming honest services fraud based on defendant's violation of state criminal disclosure law).

Taken together, the foregoing seven circuits have recognized the propriety of permitting honest services mail or wire fraud charges based on conduct that either (a) violates a state law, or (b) breaches a defendant's duty not to conceal financial conflicts of interest from the public. In the absence of controlling authority from the Ninth Circuit, the government states that this Court should follow the majority of the foregoing circuits—the First, Fourth, Seventh, and Eleventh Circuits—in allowing the government to introduce evidence to prove that the defendants (a) violated Alaska State Law by voting on legislation

during a time at which each had solicited and/or was negotiating employment from Company A, and (b) breached their respective fiduciary duties to the public of the State of Alaska by concealing the conflict-of-interest that resulted from the aforementioned job solicitations and negotiations.

II. The Indictment Properly Charges Both of the Foregoing Theories.

The Indictment charges each defendant with failing to perform the duties of his public office "free of deceit, self-dealing, bias and concealment." Indictment ¶ 87. Accordingly, at trial, the government should also be permitted to introduce evidence to demonstrate that each defendant was under a duty to disclose to the Alaska State Legislature that he was soliciting and negotiating for a job with Company A, and that neither defendant did. Such evidence should be allowed to show that each defendant conducted their affairs with "self-dealing" and "concealment," as charged in the Indictment.

With respect to relevant state laws, Section 24.60.030(e)(3) of the Alaska Statutes provides that a legislator may not "take or withhold official action or exert official influence that could substantially benefit or harm the financial interest of another person with whom the legislator is negotiating for employment." Alaska Stat. 24.60.040(e)(3). Despite soliciting and negotiating positions of employment with Company, A, each defendant voted multiple times on the PPT legislation as a member of the Alaska State Legislature. Moreover, Weyhrauch voted in the Finance Committee on both the PPT legislation and on amendments to it. And when the

PPT legislation was being considered before the full House of Representatives, both Weyhrauch and Kott cast multiple votes on both the legislation and amendments to it. At trial, the government will prove that *at no time* did either defendant refrain from voting on—much less disclose to the Alaska State Legislature—legislation that affected an entity "that could substantially benefit" from that precise piece of legislation. Given that Alaska Statute Section 24.60.030(e)(3) was located in ethics materials prepared by Weyhrauch's Select Committee on Legislative Ethics, and was distributed to both Weyhrauch and Kott prior to the 2006 legislative session, each defendant's violation of that state law was knowing and intentional.

During today's court hearing, and in Weyhrauch's recently-filed motion at Docket No. 193, Weyhrauch alleges that, notwithstanding the plain language in ¶ 87 of the Indictment, the foregoing legal theories would, if permitted, constitute a constructive amendment of it. In reviewing such allegations, the only pertinent question is "whether adequate notice of the charge has been given to the defendant." Wright, *Federal Practice and Procedure*, Criminal § 129, p. 289 (West 1969). To fulfill these purposes, an Indictment need only allege the essential elements of the offenses within the language of the statute. *United States v. Tavelman*, 650 F.2d 1133, 1137 (9th Cir. 1981); *United States v. Matlock*, 675 F.2d 981, 986 (8th Cir. 1982); *United States v. Lurz*, 666 F.2d 69, 78 (4th Cir. 1981). Thus, "an indictment needs do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crimes." *United States v. Tramunti*, 513 F.2d 1087, 1113 (2d Cir. 1975).

Indeed, it is well-settled that a defendant may not even use a motion for a bill of particulars to inquire into the means or manner by which a defendant committed a specific criminal act. *See, e.g., United States v. Gray*, 464 F.2d 632, 635 (8th Cir. 1972) (manner of offense); *Ellis v. United States*, 321 F.2d 931, 932 (9th Cir. 1963) (denied bill of particulars requesting information regarding means used by defendant to aid and abet offense); *Pines v. United States*, 123 F.2d 825 (9th Cir. 1941) (disclosure of manner and means not required). If a bill of particulars would have been insufficient to permit Weyhrauch to require the government to provide a detailed roadmap of its proof at trial, then certainly the Indictment cannot and should not be held to a higher standard.

A similar argument—relating to the multiple legal theories under which honest services fraud may be proved—was recently evaluated and rejected by the Third Circuit. In *United States v. Kemp*, — F.3d —, 2007 WL 2410132 (3d Cir. Aug. 27, 2007), two defendants challenged their honest services fraud convictions by arguing "that their convictions under the *bribery* theory of honest services fraud must be vacated because that theory was not charged in the indictment." *Id.* at * 16 (emphasis added). The Third Circuit rejected the claim, holding that in the honest services fraud context, "no greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit the defendant to prepare his defense and to invoke double jeopardy in the event of a subsequent prosecution." (Citation omitted.)

Count VI and Count VII of the Indictment specifically allege that the defendants failed to perform the duties of their public offices "free of deceit, self-dealing, bias and concealment." Indictment, ¶ 87. Unquestionably, then, the evidence at issue in the present motion *in limine* goes directly to the allegations in the Indictment. Any claim by the defendant of surprise or constructive amendment of the indictment is simply untenable. The government is under no obligation to instruct the defendants how it intends to prove the charges in the indictment, rather the government must simply provide the defendants adequate notice of the charges against them and allege the essential elements of the offenses within the language of the statute. It is beyond question that the government has fulfilled that obligation in this case. Morever, this is precisely why the government presents charges in the conjunctive.

Finally, the government takes issue with the assertion that the foregoing honest services fraud theories have "surprised" them. Both defendants have been on notice of the charges in this case since the Indictment was returned in May. Neither defendant has moved for a bill of particulars. Weyhrauch, furthermore, has been on notice of this issue for some time, given the extensive case citations by Weyhrauch in prior memoranda that acknowledged these issues. Given that the Indictment's plain language encompasses the theories discussed herein, the government does not believe that the defendants' expressed "prejudice" in preparing a defense is sufficient to trump the prejudice the United States will incur by not being able to present evidence to support the foregoing

theories that it asserts are plainly charged in Counts VI and VII.

III. The Government Requests Shortened Time for Defendants' Responses.

Finally, the government respectfully requests that the Court order responses to this Motion *In Limine* on shortened time. As the parties and the Court collectively recognized during today's hearing, an expedient resolution of these issues is paramount. Furthermore, the government agrees with the Court's acknowledgement that resolution of these matters should occur before the trial. *See* Fed. R. Crim. P. 12(d).

RESPECTFULLY SUBMITTED this 30th day of August, 2007, at Anchorage, Alaska.

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2007, a copy of the foregoing **UNITED STATES' MOTION *IN LIMINE* TO INTRODUCE EVIDENCE OF DEFENDANTS' DUTY TO DISCLOSE, FAILURE TO DISCLOSE, AND VIOLATIONS OF STATE LAW CONCERNING THEIR NEGOTIATIONS FOR EMPLOYMENT WITH "COMPANY A"** was served by e-mail on: James A. Wendt, Ray R. Brown and Douglas Pope.

s/ James A. Goeke

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case 3:07-cr-
	)	00056-JWS-JDR
PETER KOTT and	)	
BRUCE WEYHRAUCH,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM IN SUPPORT OF DEFENDANT WEYHRAUCH'S MOTION *IN LIMINE* FOR ORDER, RE: DISCLOSURE UNDER STATE LAW

Defendant Weyhrauch has moved for an order *in limine* precluding the government from arguing or representing to the jury that state statutes or House rules required Weyhrauch "to disclose" that he had sent advertising materials to VECO, or had provided

such information to Allen and Smith, or even that he was negotiating with Allen and Smith for employment at VECO. No state law or "House rules" required such a disclosure.

FACTS

On May 4, 2006, Weyhrauch, who had concluded he was not going to run again for a seat in the legislature, authored a written communication to "Bill J. Allen, c/o VECO," under a heading that it contained "Advertising Materials,"[1] which stated as follows:

> "I have long admired the role that VECO has played in our State's resource and economic development. I have practiced law and government relations since 1986, first clerking for the Alaska Superior Court, working as a shareholder in the firm of Faulkner, Banfield, Doogan & Holmes, and opening my own law office in 1998. I write to have a further conversation with you about my law office representing VECO.
>
> I have represented fishing organizations, corporations, non-profits, individuals, associations, and plaintiffs and defendants in the areas of collections, administrative law and appeals, natural resources development, construction, labor, litigation, and

---

[1] *See*, Rules 7.1, 7.2, and 7.3, Alaska Rules of Professional Conduct (A lawyer may "advertise services . . . through written . . . communication," as long as the communication does not make a misrepresentation or promise a result, and as long as the communication "include[s] the words 'Advertising Materials.'").

> government affairs. While my responsibilities as a member of the Alaska House of Representatives present new challenges, that will not detract from my ability to meet your needs.
>
> Thanks for everything you and the VECO teams has [sic] done for me. I look forward to assiting you professionally if that is possible. Please call me at your convenience. My resume is enclosed.
>
> Very truly yours,
> Bruce B. Weyhrauch"

Weyhrauch was indicted on May 3, 2007. The indictment charged in relevant part in Count I that Weyhrauch and Kott had conspired with Allen, and Smith to use the wires or the mail "in connection with a scheme and artifice to defraud the State of Alaska of its intangible right to the honest services of Kott and Weyhrauch by receiving and attempting receive things of value from" Allen, Smith, and VECO. Doc. 2, p. 8, paragraph 18. Count I further charged that

1. "In return for the . . . things of value that . . . Weythrauch attempted to receive" he "agreed to perform, attempted to perform, and actually performed official acts." *Id.* at p. 8, paragraph 19.

2. "[T]he co-conspirators effected the scheme by agreeing to provide Weyhrauch with contractual legal work for [VECO], in response to Weyhruach's written solicitation for such work with [VECO]." *Id.* at p. 9, paragraph 21.

3. "On or about May 4, 2006, and while the Alaska State Legislature was in session, Weyhrauch mailed

. . . a resume and cover letter to [Allen] in which Weyhrauch offered to provide legal services and representation to [VECO]." *Id.* at p. 12, paragraph 36.

4. On May 24, 2006, "Weyhrauch, [Smith] and [Allen] met for several hours at a restaurant at a hotel in Anchorage, Alaska, and discussed, among other things, Weyhrauch's request for employment with [VECO] and Weyhrauch's support of the 20 percent PPT legislation." *Id.* at p. 16, paragraph 54.

5. On May 30, 2006, Weyhrauch, in a handwritten note to [Allen] on Alaska State Legislature letterhead, stated, "It was great to finally spend some time with you and [Smith] last week. Call anytime. I look forward to working with you and [VECO] in the future." *Id.* at p. 17, paragraph 58.

6. On June 5, 2006, Allen told Ben Stevens "agreed" in a phone call that "Weyhrauch came to support the version of the PPT bill favored by [VECO] because [Allen] told him that [VECO] would give Weyhauch some legal work." *Id.* at p. 18, paragraph 62.

Under Count VII, the mail fraud count, the indictment realleged paragraphs 36, 54, 58, and 62 referenced above, and further alleged that Weyhrauch "devised, attempted to devise, and intended to devise a scheme and artifice to defraud and deprive the State of Alaska of its intangible right to [his] honest services . . . performed free from deceit, self-dealing, bias, and concealment." *Id.* at p. 25, paragraph 87.

During discovery, defendant requested that the government permit defendant to "[i]nspect and copy all expert witness conclusions, findings, and

statements," including "the findings and conclusions of any expert the government intends to call at trial, whether or not she has prepared a written report." *See*, Doc. 47-4, p. 4. The government advised defendant that it did not intend to call an expert and had nothing to produce.

On August 24, 2007, twelve days before trial was scheduled to commence, the government unveiled a new charge not contained in the indictment, that Weyhrauch committed mail fraud by not "disclos[ing] to the Alaska State Legislature the fact that he had solicited, and was in fact negotiating for, employment from" VECO. *See*, United States' Response to Weyhrauch's Motion *In Limine*, Docket 147, p. 17. The government signaled its intention to argue to the jury that A.S. 24.60.030(e)(3) required Weyhrauch to "disclose" that he had solicited legal work from VECO, and to also argue that Weyhrauch may be convicted of mail fraud "based on defendant's violation" of that "conflict of interest law." *See*, Motion *In Limine*, Doc. 147, pp. 16-17.

In the government's trial memorandum, filed yesterday, the government indicated for the first time that it intended to "introduce evidence that both defendants were under a legal duty to disclose to the Alaska State Legislature that they were soliciting and negotiating for jobs and other employment with VECO." Doc. 184, p. 19. Today, in open court at the pretrial conference, the government signaled an even greater expansion of its theory by arguing that defendants had a duty to disclose soliciting or negotiating for employment with VECO "under House rules."

ARGUMENT

I. ISSUES PRESENTED.

Based upon the indictment, the government's original charge of mail fraud was that Weyhrauch (1) mailed "a resume and cover letter to [Allen] in which Weyhrauch offered to provide legal services and representation to [VECO]," (2) then met with Allen and Smith and discussed "Weyhrauch's request for employment with [VECO]," and (3) then took official action. On August 24, 2007, a new charge was added, to wit: that Weyhrauch committed mail fraud by sending the solicitation letter and met with Allen and Smith, and then not "disclos[ing] to the Alaska State Legislature the fact that he had solicited, and was in fact negotiating for, employment from" VECO.

It is defendant's position that this late developing charge, if allowed to go to the jury, would "in effect" be a constructive amendment to the indictment,[2] but realizes that the court may cure any defects in the government's theory when it instructs the jury with on the mail fraud charge. Defendant does not concede the theory is one countenanced by the mail fraud statute. The government's argument clearly presents a question of first impression in the Ninth Circuit. *See*, United States' Response to Weyhrauch's Motion *In Limine*, Docket 147, pp. 13-16; Government's Trial Brief, Docket 184, pp. 17-19. No case has ever held that the mail fraud statute

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[2] *See*, *United States v. Dipentino*, 242 F.3d 1090, 1095 (9th Cir. 2001) ("A constructive amendment 'involves a change, whether literal or in effect, in the terms of the [indictment]'"), *quoting Jones v. Smith*, 231 F.3d 1232 (9th Cir. 2000).

reaches a failure "to disclose," by a state legislator to the legislative body, that the legislator has sent advertising materials or otherwise provided information to a company that is interested in legislation before the body. There is nothing in the mail fraud statute the government can point to where Congress "'convey[ed] its purpose clearly . . . to have significantly changed the federal-state balance' in the prosecution of crimes." *Cleveland v. United States*, 521 U.S. 12, 25 (2000), *quoting Jones v. United States*, 529 U.S. 848, 858 (2000), *quoting United States v. Bass*, 404 U.S. 336, 349 (1971). But, this issue will also be left for resolution after arguments over the competing mail fraud instructions and defendant's objections to any instruction the court indicates it intends to offer.

Nor does this motion address the government's theory that Weyhrauch may be convicted of mail fraud "based on defendant's violation" of that "conflict of interest law." Defendant believes the government is misreading the cases cited in its trial memorandum, and the Ninth Circuit has expressly rejected the notion that "the presence of illegal conduct alone may constitute the basis of the 'fraud.'" *United States v. Dowling*, 739 F. 2d 1445, 1449 (9th Cir. 1984), *rev'd on other grounds*, 473 U.S. 207 (1985). And, the Fifth Circuit reversed a mail fraud conviction where the district court declined to instruct the jury that "defendant should not be found guilty of the federal offense merely because he violated state law." *See, United States v. Washington*, 688 F. 2d 953, 958 (5th Cir. 1982). Again, that issue will be resolved after arguments over the competing mail fraud instructions and defendant's objections to any instruction the court

indicates it intends to offer, and defendant intends to offer further briefing on this issue as time permits.

Nor does this motion object to the introduction of any particular evidence at this time, although defendant notes that the government's newly stated intention to offer evidence that "both defendants were under a legal duty to disclose" sounds an awful lot like the government could end up offering percipient expert testimony that A.S. 24.60.030(e)(3) is a "disclosure" statute.

Nor does this motion address the impact of the government's additional mail fraud charge on the impending trial. The new theory of mail fraud clearly opens up unanticipated issues which will add much to counsel's already full plate and prolong the trial. The court will be required to determine the meaning of "negotiating for employment" by "citizen legislators," and whether rules involving "the business of the House" required disclosure,[3] and it is reasonable to anticipate that this will lead to additional witnesses as the "business of the House" becomes relevant to the meaning of the statutes and rules. Defendant intends to address issues pertaining to the impact on the trial and counsel in a subsequent motion.

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[3] *See, Malone v. Meekins*, 650 P. 2d 351, 356-357 (Alaska 1982). In *Malone*, the Alaska Supreme Court declined to intervene in a controversy involving issues "committed to the House" on separation of powers grounds. 650 P. 2d at 356-357. Although the constitutional separation of powers is not at issue here, the constitutional concerns of federalism clearly are when a federal court instructs a federal jury on the meaning of statutes and legislative rules, and whether violation of those statutes or rules can justify a mail fraud conviction.

The limited issue that defendant presents here on shortened time is that the government does not have the right to argue or represent to the jury that A.S. 24.60.030(e)(3) is a "disclosure" statute because it is not, nor does the government have the right to argue or represent to the jury that other state law or "House rules" required disclosure, because they didn't, and the government should be precluded from arguing or representing to the jury that state statutes or House rules required Weyhrauch "to disclose" that he had sent the advertising materials to VECO, or had provided such exchanged information to Allen and Smith, or even that he was negotiating with Allen and Smith for employment at VECO.

II. NEITHER ALASKA LAW, NOR THE RULES OF THE ALASKA HOUSE OF REPRESENTATIVES, REQUIRED WEYHRAUCH "TO DISCLOSE."

Weyhrauch vehemently denies that he was ever "negotiating for employment" with VECO, Allen, or Smith. Even if the court takes the allegations in the indictment in the light most favorable to the government, when Weyhrauch sent the advertising materials to Allen and VECO, he was only soliciting employment and not negotiating for employment. Nevertheless, even if there were facts to support a theory that Weyhrauch was "negotiating for employment" with Allen, Smith, and VECO, neither state law nor legislative rules required Weyhrauch "to disclose."

At material times, the "Standards of Conduct" for Alaska state legislators included the following provision:

> "A legislator may not . . . unless required by the Uniform Rules of the Alaska State Legislature, take or withhold official action or exert official influence that could substantially benefit or harm the financial interest of another person with whom the legislator is negotiating for employment."

A.S. 25.60.030(e)(3). The government argues that "Weyhrauch's failure to disclose that relationship [to the Alaska House of Representatives] is admissible . . . to prove an intent to defraud through the knowing violation of a state law, here A.S. 25.60.030(e)(3)." Doc. 147, p. 17. This argument is meritless.

The government should be precluded by an order *in limine* from arguing or representing to the jury that A.S. 24.60.030(e)(3) required Weyhrauch "to disclose," because it clearly does not. The statute merely provides that a "legislator may not . . . take or withhold official action" while he is "negotiating for employment." The disclosure statutes in the legislative ethics code are found elsewhere. *See*, A.S. 24.60.070 (Disclosure of Close Economic Association); A.S. 24.60.100 (Disclosure of Representation Before State Agency); and A.S. 24.60.200 (Financial Disclosure).

For the purposes of this motion, and at times material to the indictment, the duty of a legislator to disclose was limited to the following:

1. "[T]he formation or maintenance of a close economic association involving a substantial financial matter with a supervisor . . . who has responsibility or authority . . . over the person's employment." A.S. 24.60.070(a).

2. "[T]he name of the person represented [before a state agency, board, or commission], the subject matter of the representation, and the body before which the representation is to take place." A.S. 24.60.100.

3. The "income in excess of $5,000 received as compensation for personal services, the name and address of the source of income, and a statement describing the nature of the services performed." A.S. 24.60.200.[4]

In construing state law, a district court applies state supreme court decisions. *See, Colonial Ins. Co. Of California v. Tumbleson*, 889 F. Supp 1136, 1142 (D. Ak. 1995). Under Alaska law, the language in A.S. 24.60.030(e)(3) must be read *in para materia* with the above disclosure statutes "in order that a total scheme evolves which maintains the integrity of each act and avoids ignoring one or the other." *See, Hafling v. Inlandboatmen's Union of Pacific*, 585 P. 2d 870, 878 (Alaska 1978). On the face of the statutes in the legislative ethics code, A.S. 24.60.030(e)(3) is a general statute stating that a legislator should withhold action that could substantially benefit or harm a person "with whom the legislator is negotiating for employment," while

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[4] A legislator also has duties "to report" those matters required by A.S. 39.50.030. *See*, A.S. 24.60.200(1). A.S. 39.50.030 is the "financial and business interests" disclosure statute for various "public official[s]" and "candidates for state elective office." The requirements of disclosure under that statute focus on income, ownership and partnership interests, loans, state contracts, natural resource leases, and "formation or maintenance of a close economic association" with legislators, public officials, and lobbyists.

the other statutes are specific disclosure statutes. Accordingly, there is no conflict between the statutes because the court may "maintain[] the integrity of each act and avoid[] ignoring one or the other" by concluding that A.S. 24.60.030(e)(3) is not a disclosure statute.

Even if the court concluded that the statutes appeared to be in conflict, however, it is well-established in Alaska law that any "conflict must be resolved in favor of the more specific" statutes. *See, Stone v. State*, 690 P. 2d 22, 24 (Alaska App. 1984), *citing Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) and *Sprague v. State*, 590 P. 2d 410, 415 n. 14 (Alaska 1979). *See, also, O'Callaghan v. Rue*, 996 P. 2d 88, 99 n. 58 (Alaska 2000) ("Generally, 'a more specific statute governs over an otherwise applicable general statute.'"), *quoting Jenkins v. Daniels*, 751 P. 2d 19, 22 (Alaska 1988). Further, under Alaska law, "where certain things are designated in a statute, 'all omissions are understood as exclusions.'" *Ranney v. Whitewater Engineering*, 122 P. 3d 214, 218 (Alaska 2005). This rule of construction is "particularly compelling where . . . the scheme is purely statutory and without a basis in the common law." *Id.* Therefore, when the legislative ethics act "includes a detailed list" of items subject to disclosure, "the failure to include" soliciting or negotiating for employment "suggests their exclusion." *Id.* at 219. Accordingly, state law did not require disclosure that Weyhrauch was "negotiating for employment" with VECO, and certainly did not require disclosure that the had sent "advertising materials" to Allen and VECO or provided such information to Allen and Smith.

Nor did the rules of the Alaska Legislature require a member to disclose such matters before voting. *See*, Rule 34 (Voting Procedure), Uniform Rules of the Alaska Legislature ("Uniform Rules"). The Uniform Rules only set out a process for asking to abstain from voting but do not require that a request be placed.

> "Every member present in the house shall vote unless the house for special reasons permits a member to abstain. All motions excusing a member from voting shall be made before the house divides or before the call for yeas and nays is commenced. A member requesting to be excused from voting may make a brief oral statement of the reasons for the request and the question of granting permission to abstain shall be taken without further debate. A member may not explain a vote, may not discuss the question while the yeas and nays are being called, and may not change a vote after the roll call result has been announced. Upon division and count of the house of any question a member who is not within the chamber may not be counted. A member may not be permitted to abstain except upon the unanimous consent of the membership."

Rule 34(b), Uniform Rules.

Accordingly, there is no support in Alaska law for the government's position that Alaska law required Weyhrauch "to disclose" that he had sent advertising materials to VECO, or that he had provided such information to Allen and Smith, or even that he was negotiating with Allen and Smith for employment at

VECO, and the government should be precluded from arguing or representing to the jury that A.S. 24.60.030(e)(3) is a "disclosure" statute or that state statutes or "House rules" otherwise required disclosure.

DATED this 30th day of August, 2007, at Anchorage, Alaska.

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Certificate of Service

I hereby certify that the foregoing was served electronically on Joseph Bottini, James Goeke, Ray Brown, James A. Wendt and Margaret Simonian this 30th day of August, 2007:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. PETER KOTT and BRUCE WEYHRAUCH Defendants.	)	No. 3:07-cr-00056-JWS-JDR **UNITED STATES' MEMORANDUM IN RESPONSE TO WEYHRAUCH'S MEMORANDUM AT DOCKET NO. 194 CONCERNING HONEST SERVICES FRAUD**

The United States, by and through undersigned counsel, hereby responds to Weyhrauch's Memorandum filed at Docket No. 194 in the above-captioned matter.

Weyhrauch's Memorandum presents four issues: (1) whether honest services mail fraud legally permits a prosecution based on a defendant's violation of a state law; (2) whether honest services mail fraud legally permits a prosecution based on a defendant public official's knowing concealment of a conflict of interest; (3) whether the Indictment's charging language encompasses the foregoing theories of prosecution; and (4) whether, as a result, the government intends to prosecute Weyhrauch on a theory that Alaska Statute 24.60.030 is a "disclosure" statute.

Issues (1) and (2) are, in the government's view, addressed in the government's motion *in limine* filed at Docket No. 195, and as such no further discussion will be provided herein on those issues. The government's position on issue (3) is also briefed in the motion *in limine* and will not be addressed substantively again in this Memorandum. With respect to issue (3), however, the government disagrees with Weyhrauch's argument that his first notice of these honest services fraud theories was "[o]n August 24, 2007, twelve days before trial was scheduled to commence." *See* Docket No. 194 at 4. In addition to the plain language of the Indictment, Weyhrauch's August 20, 2007, memorandum (*see* Docket No. 124) repeatedly cited numerous honest services fraud cases that articulated the same theories upon which the government intends to rely.

One must assume that Weyhrauch was aware of those theories when he cited them to the Court.

It further appears that Weyhrauch claims that—again, irrespective of the Indictment—he was given *no other* specific notice from the government, prior to August 24, 2007, of the government's intent to prosecute Weyhrauch on the foregoing honest services fraud theories. *Id.* If that is in fact Weyhrauch's position, the government stridently disagrees. At this time, the government's ability to respond in detail is constrained by certain provisions of the Federal Rules of Evidence; however, should it be confirmed that the foregoing is indeed the assertion being made by Weyhrauch's counsel herein, the interests of justice may require the government to provide certain additional information to the Court for its consideration and to correct any misrepresentations to the Court.

Issue (4), however, is not addressed by the government in its motion *in limine*. Below, the government sets forth a more detailed explanation of the manner in which it intends to establish the violations of Counts VI and VII under the theories explained in its Motion *in Limine*.

First, each member of the Alaska State Legislature has an inherent fiduciary duty to the public of the State of Alaska to conduct their dealings free of conflicts of interest. The existence of this duty is intrinsic to a public official's obligation to conduct his or her affairs free of improper influences. Furthermore, the existence of this duty is explicitly codified at Alaska Statutes § 24.60.010(2), which requires state legislators to avoid not only conflicts of

interest, but also *the appearance* of conflicts of interest:

> [A] fair and open government requires that legislators and legislative employees conduct the public's business in a manner that preserves the integrity of the legislative process and avoids conflicts of interest or even appearances of conflicts of interest.

Id. By introducing amendments to, and by voting on, legislation that each defendant knew would affect Company A—an entity with whom each defendant either had, or was negotiating for, a financial relationship—each defendant knowingly breached that duty of disclosure. That particular type of breach of a fiduciary duty by a public official can serve as the basis for a honest services fraud prosecution.

To this extent, the government will also prove that the House of Representatives had a customary process and procedure through which members disclosed conflicts of interest prior to voting on legislation on which they believed they had a financial interest. The government will also introduce evidence that, although Weyhrauch disclosed other conflicts of interest before the House of Representatives during the 2006 legislative session, he disclosed no such conflict of interest concerning either Company A or concerning the PPT legislation.

Second, each member of the Alaska State Legislature is precluded by state law from "tak[ing] or withhold[ing] official action or exert[ing] official influence that could substantially benefit or harm the financial interest of another person with whom the

legislator is negotiating for employment." Alaska Stat. 24.60.030(e)(3). By introducing amendments to legislation, as well as by voting on legislation, that each defendant knew would affect Company A—an entity with whom each defendant either had, or was negotiating for, a financial relationship—each defendant violated Alaska state law. That violation of Alaska state law can serve as the basis for a honest services fraud prosecution. To this extent, the government will prove that each defendant was negotiating for employment with Company A during the time that they introduced amendments, voted on amendments, and voted on legislation that had a substantial financial impact on Company A.

Third, there is a basis to interpret Section 24.60.030, coupled with the Uniform Rules of the Alaska State Legislature, as requiring some type of action or disclosure by a legislator prior to voting on affected legislation. Section 24.60.030(e)(3) precludes a legislator from taking any action (including both voting and the introduction of amendments) on any legislation in the circumstances proscribed in that statute, but also provides that a legislator may be able to vote (but not offer amendments) if required to do so under the Uniform Rules of the Alaska State Legislature. Uniform Rule 34(b) establishes a process under which a member of the Alaska State Legislature may abstain, for any reason, from voting[1] on a particular piece of legislation. Taken together, these provisions establish the following framework: (1) a member cannot vote on legislation that affects a

---

[1] Again, Uniform Rule 34(b) relates exclusively to voting on pending legislation. It does not apply to the introduction of laws or amendments.

potential employer; and (2) in order *not* to vote on particular legislation pending before the entire House of Representatives, a member has an obligation to request to abstain from voting in order to comply with 24.60.030(e)(3). If, after the request to abstain, a legislator is required to vote by the remainder of the House of Representatives, then the legislator may do so.

Here, the government will prove that neither defendant ever declared a conflict of interest concerning the pending legislation that benefitted Company A, nor did either defendant request to abstain from voting on that legislation. Such failure was intended to conceal the existence of each defendant's financial relationship from the Legislature and from the public.

Finally, the government disagrees with Weyhrauch's contention that the foregoing issues will prolong the trial. These provisions are, in the government's view, quite straightforward. There will be no need for expert testimony to establish these legal standards, just as there is never any expert legal testimony to establish the legal standards of any other criminal case. The Court is in the province of instructing juries on the law and will do so in this case as well.

RESPECTFULLY SUBMITTED this 1st day of September, 2007, at Anchorage, Alaska.

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2007, a copy of the foregoing **UNITED STATES' RESPONSE TO WEYHRAUCH'S MEMORANDUM AT DOCKET NO. 194 CONCERNING HONEST SERVICES FRAUD** was served by e-mail on: James A. Wendt, Ray R. Brown and Douglas Pope.

s/ Nicholas A. Marsh

PETITIONER'S BRIEF

Supreme Court, U.S.
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140

(5)

No. 08-1196

IN THE

Supreme Court of the United States

BRUCE WEYHRAUCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTION PRESENTED

Whether, to convict a state official for depriving the public of its right to the defendant's honest services through the nondisclosure of material information, in violation of the mail-fraud statute (18 U.S.C. §§ 1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

SUMMARY OF ARGUMENT 18

ARGUMENT 22

I. THE LANGUAGE OF 18 U.S.C. § 1346 DOES NOT AUTHORIZE PROSECUTIONS OF STATE OFFICIALS WHERE THE WRONG ALLEGED IS SIMPLY A FAILURE TO DISCLOSE PERCEIVED CONFLICTS OF INTEREST AND THE NONDISCLOSURE VIOLATES NO EXISTING LEGAL DUTY TO DISCLOSE SEPARATE AND APART FROM § 1346 22

II. THE NINTH CIRCUIT'S READING OF § 1346 TO MANDATE A FEDERAL COMMON LAW OF STATE OFFICIALS' DISCLOSURE DUTIES VIOLATES SEVERAL ESTABLISHED CANONS OF CONSTRUCTION 29

TABLE OF CONTENTS
(continued)

Page

A. Reversal Of The Decision Below Is Compelled By The Well-Established Principle That Congress Must Speak Clearly When It Acts In A Way That Invades The Usual Prerogatives Of The States 30

B. It Is Further Compelled By The Principle Of Constitutional Avoidance, So That The Statute Is Not Rendered Void For Vagueness 34

C. If The Court Finds The Statute Ambiguous, The Rule Of Lenity Also Requires That Violations Based On Nondisclosure Rest On A Preexisting Duty To Disclose Separate From § 1346..... 37

III. THE NINTH CIRCUIT'S RECOGNITION OF A FEDERAL COMMON LAW GOVERNING STATE OFFICIALS' DISCLOSURE DUTIES IS WRONG UNDER THIS COURT'S MANY CASES ADDRESSING THE RULE OF FEDERAL COMMON LAW..... 39

IV. THE LEGISLATIVE HISTORY LENDS NO SUPPORT TO THE DECISION BELOW 44

TABLE OF CONTENTS
(continued)

Page

A. The Sparse Legislative History Of § 1346 Provides No Useful Guidance For The Proper Interpretation Of The Statute 44

B. Any Effort To Implement A Statutory Intent To "Reinstate All Of The Pre-McNally Case Law" Would Render The Statute Incoherent 47

V. REQUIRING HONEST SERVICES PROSECUTIONS OF STATE OFFICIALS FOR NONDISCLOSURE TO REST ON BREACH OF A PREEXISTING DUTY TO DISCLOSE IN NO WAY IMPEDES THE VIGOROUS PROSECUTION OF FRAUD AND BRIBERY 50

CONCLUSION 53

TABLE OF AUTHORITIES

Page

CASES

Atherton v. F.D.I.C.,
519 U.S. 213 (1997) 42

Blum v. Stenson,
465 U.S. 886 (1984) 44

Bouie v. City of Columbia,
378 U.S. 347 (1964) 34

Boyle v. United Tech. Corp.,
487 U.S. 500 (1988) 40

Butner v. United States,
440 U.S. 48 (1979) 29

Carpenter v. United States,
484 U.S. 19 (1987) 24

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 43

Chiarella v. United States,
445 U.S. 222 (1980) 25, 26

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 44

City of Chicago v. Morales,
527 U.S. 41 (1999) 35

City of Milwaukee v. Illinois,
451 U.S. 304 (1981) 40

Cleveland v. United States,
531 U.S. 12 (2000) 24, 33

TABLE OF AUTHORITIES
(continued)

Page

Croll v. Croll,
229 F.3d 133 (2d Cir. 2000) 23

Dean v. United States,
129 S. Ct. 1849 (2009) 22

DeSylva v. Ballentine,
351 U.S. 570 (1956) 29

Dolan v. U.S. Postal Serv.,
546 U.S. 481 (2006) 24

Engine Mfrs. Assn. v. S. Coast Air Quality Mgmt. Dist.,
541 U.S. 246 (2004) 23

Evans v. United States,
504 U.S. 255 (1992) 31

Exxon Mobil Corp. v. Allapattah Services, Inc.,
545 U.S. 546 (2005) 49

Florida Lime & Avocado Growers v. Paul,
373 U.S. 132 (1963) 41

Gregory v. Ashcroft,
501 U.S. 452 (1991) 30, 31, 33

McNally v. United States,
483 U.S. 350 (1987) ..... passim

Miree v. DeKalb County,
433 U.S. 25 ..... 40, 42, 43

Neder v. United States,
527 U.S. 1 (1999) 24

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) 42

TABLE OF AUTHORITIES
(continued)

Page

O'Melveny & Meyers v. F.D.I.C.,
512 U.S. 79 (1994) 40, 41

Papachristou v. City of Jacksonville,
405 U.S. 156 (1972) 36

Pilot Life Ins. Co. v. Dedeaux,
481 U.S. 41 (1987) 40, 41

Piper v. Chris-Craft Indus., Inc.,
430 U.S. 1 (1977) 44

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) 42

Sorich v. United States,
129 S. Ct. 1308 (2009) 37, 52

Ullmann v. United States,
350 U.S. 422 (1956) 27

United States v. Bass,
404 U.S. 336 (1971) 30, 31, 38

United States v. Bloom,
149 F.3d 649 (7th Cir. 1998) 36

United States v. Brumley,
116 F.3d 728 (5th Cir. 1997) ..... passim

United States v. Capital Tax Corp.,
545 F.3d 525 (7th Cir. 2008) 29

United States v. Czubinski,
106 F.3d 1069 (1st Cir. 1999) 51

United States v. Dixon,
536 F.2d 1388 (2d Cir. 1976) 51

TABLE OF AUTHORITIES
(continued)

Page

United States v. Holzer,
816 F.2d 304 (7th Cir. 1987) 48

United States v. Hudson,
11 U.S. (7 Cranch) 32 (1812) 39, 44

United States v. Kimbell Foods, Inc.,
440 U.S. 715 (1979)..... 28

United States v. Lanier,
520 U.S. 259 (1997)..... 43

United States v. Lopez,
541 U.S. 549 (1995) 31, 42

United States v. Mandel,
591 F.2d 1347 (4th Cir. 1979)..... 48

United States v. McNeive,
536 F.2d 1245 (8th Cir. 1976)..... 48

United States v. Oakland Cannabis Buyer's Co-op.,
532 U.S. 483 (2001)..... 43

United States v. Rabbitt,
583 F.2d 1014 (8th Cir. 1978)..... 24, 48, 51

United States v. Reese,
92 U.S. 214 (1926)..... 34

United States v. Rybicki,
354 F.3d 124 (2d Cir. 2003) 47, 48, 49, 50

United States v. Santos,
128 S. Ct. 2020 (2008)..... 38

United States v. Shabani,
513 U.S. 10 (1994)..... 38

TABLE OF AUTHORITIES
(continued)

Page

United States v. Urciuoli,
513 F.3d 290 (1st Cir. 2008) 36

United States v. Williams,
128 S. Ct. 1830 (2008) 35, 36

Wallis v. Pan American Petroleum Corp.,
384 U.S. 63 (1966) 41, 42, 43

Weinberger v. Rossi,
456 U.S. 25 (1982) 46

Wheeldin v. Wheeler,
373 U.S. 647 (1963) 40

Williams v. United States,
458 U.S. 279 (1982) 29

Wilson v. Garcia,
471 U.S. 261 (1985) 29

STATUTES AND LEGISLATIVE MATERIALS

17 U.S.C. § 1 29

18 U.S.C. § 225 5

18 U.S.C. § 371 10

18 U.S.C. § 666 10

18 U.S.C. § 1341 ..... passim

18 U.S.C. § 1346 ..... passim

18 U.S.C. § 1951 10

133 Cong. Rec. H6798 (daily ed. July 29, 1987) ... 3, 4

133 Cong. Rec. S16742-03 (daily ed. Nov. 30, 1987) 23

TABLE OF AUTHORITIES
(continued)

Page

134 Cong. Rec. H11108-01 (daily ed. Oct. 21, 1988) 6, 45

134 Cong. Rec. S15640 (daily ed. Oct. 12, 1988) 6

134 Cong. Rec. S16315-17 (daily ed. Oct. 14, 1988) 6

134 Cong. Rec. S17360-02 (daily ed. Nov. 10, 2008) 46

ALASKA CONST. art. II, § 8 32

ALASKA STAT. § 24.60.010 ..... 13, 14

ALASKA STAT. § 24.60.200 32

ALASKA STAT. § 26.60.040 14

ALASKA STAT. § 26.60.050 14

ALASKA STAT. § 26.60.070 14

ALASKA STAT. § 26.60.100 14

ALASKA STAT. § 26.60.200 14

ALASKA STAT. § 26.60.30 14

Anti-Corruption Act of 1988, H.R. 5498, S. 2793, 100th Cong. (2d Sess. 1988) 5

Anti-Public Corruption Act of 1988, H.R. 4871, S. 2531, 100th Cong. (2d Sess. 1988) 4

Fraud Amendments Act of 1987, H.R. 3089, S. 1898, 100th Cong. (1st Sess. 1987) 4, 23

Mail Fraud Amendments Act of 1987, H.R. 3050,100th Cong. (1st Sess. 1987) 4

OTHER AUTHORITIES

17 C.F.R. § 240.10 25

TABLE OF AUTHORITIES
(continued)

Page

BALLANTINE'S LAW DICTIONARY (3d ed. 1969)..... 26

Black, Henry Campbell, A DICTIONARY OF LAW (1891)..... 27

Brown, George D., *Should Federalism Shield Corruption?*, 82 CORNELL L. REV. 225 (1996) 27, 31, 51

Gray, John Chipman, THE NATURE AND SOURCES OF THE LAW (2d ed. 1921) 27

How They Voted: Oil and Gas Tax Law Rewrite, ANCHORAGE DAILY NEWS, Aug. 13, 2006 9

Kurland, Adam H., *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 488-90 (1989)..... 6

Lewis, Neil A., *Justice Dept. Moves to Void Stevens Case*, N.Y. TIMES, Apr. 1, 2009..... 37

Mohr, Charles, *Drug Bill Passes, Finishing Business of 100th Congress*, N.Y. TIMES, Oct. 23, 1998 6

Moohr, Geraldine Szott, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1 (1998) 47

Moohr, Geraldine Szott, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, HARV. J. LEGIS. 153 (1994)..... 35

TABLE OF AUTHORITIES
(continued)

Page

Murkowski, Frank, *Executive Proclamation* (June 26, 2006), available at http://w3.legis.state.ak.us/docs/pdf/24special/Proclamation3rdSpecialSession2006.pdf 9

Murkowski, Frank, *Executive Proclamation* (May 9, 2006), available at http://w3.legis.state.ak.us/docs/pdf/24special/ProclamationSpecialSession2006.pdf 8

OXFORD ENGLISH DICTIONARY (2d ed. 1989) 26

Ruff, Charles F.C., *Federal Prosecution of Local Corruption*, 65 GEO. L.J. 1171 (1977)..... 30

WEBSTER'S II NEW COLLEGE DICTIONARY (3d ed. 2005) 27

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) 26

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-21a) is reported at 548 F.3d 1237. The district court's order granting petitioner's motion in limine (*id.* at 22a-36a) is unreported.

JURISDICTION

The Court of Appeals issued its decision on November 26, 2008. The Petition for Rehearing *En Banc* was denied on January 7, 2009 (Pet. App. 37a). The petition for a writ of certiorari was filed on March 25, 2009, and granted on June 29, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1341 of Title 18, United States Code, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the

> Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Section 1346 of Title 18, United States Code, provides:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT

Following this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), Congress adopted 18 U.S.C. § 1346, which extended the federal mail, wire, and related fraud statutes to schemes to defraud by "depriving another of the intangible right of honest services." This case presents the question whether those fraud provisions, thus extended, may encompass a state official's simple failure to disclose an employment solicitation—with no proof his conduct was compromised in some way—on the theory that the nondisclosure, though otherwise consistent with state and federal law, violated a

federal common law disclosure duty arising under § 1346.

1. Beginning in the 1970s, federal prosecutors began to prosecute state and local officials under the theory that the mail and wire fraud statutes proscribed schemes to defraud citizens of intangible rights, most often on facts involving the acceptance of bribes or the use of a defendant's official position to advantage himself or his friends in some way. This theory of liability under the federal fraud statutes achieved wide acceptance in the courts of appeals.

In *McNally v. United States*, 483 U.S. 350 (1987), this Court rejected the view that the mail and wire fraud statutes criminalized schemes to defraud another of intangible rights. "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," the Court read "§ 1341 as limited in scope to the protection of property rights." *Id.* at 360. In order to criminalize the act of defrauding another of an intangible right of honest services, the Court concluded, a much clearer statement of purpose would be required from Congress. *Id.*

Four different attempts to legislatively overturn *McNally* failed before Congress settled upon the language that now composes § 1346.

a. In July of 1987, little more than one month after this Court decided *McNally*, Representatives Kweisi Mfume and Michael Synar introduced a bill "to restore the full force of the mail fraud statute." 133 Cong. Rec. H6798 (daily ed. July 29, 1987) (statement of Rep. Synar). Under this proposal, entitled the

Mail Fraud Amendment Act of 1987, "defraud" would be defined to include "the defrauding of the citizens of a body politic—(1) of their right to the conscientious, loyal, faithful, disinterested, and unbiased performance of official duties by a public official thereof; or (2) of their right to have the public business conducted honestly, impartially, free from bribery, corruption, bias, dishonesty, deceit, official misconduct, and fraud." *See* H.R. 3050, 100th Cong. (1st Sess. 1987). The purpose of the bill, according to Rep. Synar, was to overrule *McNally*'s conclusion that a public official can be prosecuted under the mail fraud statute for accepting kickbacks only where the fraud deprives another of money or property. *See* 133 Cong. Rec. H6798 (daily ed. July 29, 1987) (statement of Rep. Synar). The bill, however, never progressed beyond hearings held by the House Judiciary's Subcommittee on Criminal Justice.

b. Approximately two months after *McNally*, Sen. Arlen Specter and Rep. John Conyers introduced the Fraud Amendments Act of 1987, H.R. 3089, S. 1898, 100th Cong. (1st Sess. 1987). In relevant part, this far-sweeping legislation would have defined fraud to include the defrauding another "of intangible rights of any kind whatsoever in any manner or for any purpose whatsoever." The Fraud Amendments Act likewise died in committee.

c. In June of 1988, Sen. Mitch McConnell and Rep. George Gekas proposed the Anti-Public Corruption Act of 1988, H.R. 4871, S. 2531, 100th Cong. (2d Sess. 1988). The Anti-Public Corruption Act would have made it a crime for any person to endeavor by scheme or artifice corruptly to deprive or defraud the inhabitants of a State or political subdivision of the

honest services of a State or local official or employee or to deprive inhabitants of a fair and impartially conducted election through fraudulent ballots or voter registration forms. This bill likewise proceeded no further than referral to the House's Subcommittee on Criminal Justice and the Senate Judiciary Committee.

d. Finally, in September of 1988, Sen. Joseph Biden and Rep. Gekas introduced the Anti-Corruption Act of 1988, H.R. 5498, S. 2793, 100th Cong. (2d Sess. 1988). The Act proposed the addition of two new statutes: one to combat public corruption to be codified at 18 U.S.C. § 225, and another to address private corruption to be codified at 18 U.S.C. § 1346. The language addressing private corruption provided:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive an organization of the intangible right of honest services in which the defendant received or attempted to receive, for the defendant or another person, anything of value or in which the defendant intended or contemplated loss or harm to the organization.

The section addressed to public corruption provided, in relevant part, that "[w]hoever * * * deprives or defrauds, or attempts to deprive or defraud, by any scheme or artifice, the inhabitants of a State or political subdivision of a State of the honest services of an employee or official of such State or subdivision" shall be fined and imprisoned no more than ten years.

The Anti-Corruption Act was reported favorably by the Judiciary Committee, and passed the Senate by voice vote on October 14, 1988 as part of a package of forty-seven amendments to a highly publicized drug bill. See 134 Cong. Rec. S15640 (daily ed. Oct. 12, 1988) (list of amendments to drug bill, including S. 2793); 134 Cong. Rec. S16315-17 (daily ed. Oct. 14, 1988) (passing S. 2793).

The election year drug bill, with S. 2793 included, was then sent to the House. *See* Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 488-90 (1989) (detailed legislative history of § 1346). The House leadership "apparently balked" at the far-reaching language proposed by the Senate, and hammered out the language now composing § 1346 in "eleventh hour reconciliation deliberations" with Senate leaders. *Id.* at 488 n.450.

The House passed the amended omnibus drug bill, with the language of § 1346 included, by a vote of 346-11 on October 22, 1997, the last day of the 100th Congress. The Senate agreed to the amended drug bill by voice vote on the same day. *See* H.R. 5210, 100th Cong. § 7603 (2d Sess. 1988); 134 Cong. Rec. H11108-01, S17301-01 (daily ed. Oct. 21, 1988); *see also* Charles Mohr, *Drug Bill Passes, Finishing Business of 100th Congress*, N.Y. TIMES, Oct. 23, 1998, at A11 (noting that drug bill cleared Senate at 3:16 a.m.). Congress enacted § 1346 without referring the language to any committee and without any floor debate. *See United States v. Brumley*, 116 F.3d 728, 739 (5th Cir. 1997) (en banc) (Jolly & DeMoss, JJ., dissenting).

2. Petitioner Bruce Weyhrauch, a licensed attorney, was first elected to represent Juneau in the Alaska House of Representatives in 2002. J.A. 14. Petitioner represented Juneau in February 2006, when Governor Frank Murkowski proposed that the legislature adopt legislation altering the state's oil production taxation scheme. Pet. App. 2a. According to Gov. Murkowski's proposal, the new tax system—referred to as a "petroleum production tax" or "PPT"—would tie the State's tax on oil producers to a percentage of the producer's net profits. J.A. 16-17. The government alleges that VECO Corporation, an oil field services company, supported the proposed legislation but opposed any bill that taxed oil producers' profit at a rate greater than twenty percent. *Id.*

On May 4, 2006, five days before the legislature's scheduled adjournment, petitioner—who had concluded that he would not run for reelection—drafted a letter to Bill J. Allen, CEO of VECO, soliciting future employment. The letter, which included a header stating "Advertising Materials," as required by the Alaska Rules of Professional Conduct, stated:

> I have long admired the role that VECO has played in our State's resource and economic development. I have practiced law and government relations since 1986, first clerking for the Alaska Superior Court, working as a shareholder in the firm of Faulkner, Banfield, Doogan & Holmes, and opening my own law office in 1998. I write to have a further conversation with you about my law office representing VECO.

> I have represented fishing organizations, corporations, non-profits, individuals, associations, and plaintiffs and defendants in the areas of collections, administrative law and appeals, natural resources development, construction, labor, litigation, and government affairs. While my responsibilities as a member of the Alaska House of Representatives present new challenges, that will not detract from my ability to meet your needs.
>
> Thanks for everything you and the VECO teams has [sic] done for me. I look forward to assisting you professionally if that is possible. Please call me at your convenience. My resume is enclosed.

J.A. 53-54. The indictment alleges that petitioner mailed the letter and enclosed resume through the United States mails. *Id.* at 23.

On May 9, 2006, when it appeared that the legislature would adjourn without acting on his taxation proposal, Gov. Murkowski called a 30-day "special joint session." *See* Gov. Frank Murkowski, *Executive Proclamation* (May 9, 2006), *available at* http://w3.legis.state.ak.us/docs/pdf/24special/ProclamationSpecialSession2006.pdf. The indictment alleges that on May 16, Bill Allen sent petitioner and other members of the Alaska legislature an e-mail asking them to vote for the twenty percent PPT bill. J.A. 26. The indictment further alleges that on or about May 19, 2006, petitioner e-mailed Allen stating, "I will be arriving in Anchorage on Wednesday May 24 and would like to meet with you at 4 pm to discuss a mutually beneficial relationship." *Id.* On or about

May 24, 2006, Allen met petitioner at a restaurant in Anchorage and allegedly discussed his employment solicitation and support for the twenty percent PPT legislation. *Id.* Six days later, petitioner allegedly mailed Allen a hand-written note on Alaska State Legislature letterhead, stating, "It was great to finally spend some time with you * * * last week. Call anytime. I look forward to working with you and [VECO] in the future." *Id.* at 27. The government further charges that on June 4, petitioner proposed that the House adjourn sine die before a vote could be taken on an amendment to the PPT bill that would have lowered the price threshold triggering an additional tax on oil producers. *Id.* at 28.

On June 26, 2006, Gov. Murkowski called for an additional 30-day special session because the legislature had still not passed his taxation proposal. *See* Gov. Frank Murkowski, *Executive Proclamation* (June 26, 2006), *available at* http://w3.legis.state.ak.us/docs/pdf/24special/Proclamation3rdSpecialSession2006.pdf. On or about July 19, 2006, petitioner allegedly told a VECO official that he intended to "shoe-horn[]" himself into a meeting of legislators that were studying a new proposal for the PPT bill, learn about the details of the new PPT proposal, and then report those details to VECO. J.A. 29-30. On the last day of the special session, the House approved a PPT bill that taxed oil producers at 22.5 percent, above the rate supported by VECO. *See How They Voted: Oil and Gas Tax Law Rewrite*, ANCHORAGE DAILY NEWS, Aug. 13, 2006, at B3. Petitioner voted in favor of the legislation. *Id.*

3. Petitioner's indictment resulted from a large-scale investigation conducted by the FBI into

financial ties between VECO and several Alaskan legislators. In total, the VECO investigation resulted in either the indictment or guilty plea of twelve individuals, including Senator Ted Stevens and VECO CEO Bill Allen.

The government charged petitioner and former House Speaker Pete Kott in the same indictment on May 3, 2007. The indictment charged petitioner and Rep. Kott with conspiracy to commit extortion under color of official right, bribery, and honest services fraud, all in violation of 18 U.S.C. § 371; attempted interference with commerce by extortion induced under color of official right in violation of 18 U.S.C. § 1951; bribery concerning programs receiving federal funds in violation of 18 U.S.C. § 666; and honest services fraud in violation of 18 U.S.C. §§ 1341 and 1346.

In the honest services fraud charge, the government alleged that petitioner and Rep. Kott, along with VECO officials, "aided and abetted by one another, devised, attempted to devise, and intended to devise a scheme and artifice to defraud and deprive the State of Alaska of its intangible right to the honest services of KOTT and [WEYHRAUCH], performed free from deceit, self-dealing, bias, and concealment." J.A. 35. The indictment alleged, *inter alia*, a scheme in which VECO was "to provide, or agree to provide things of value to * * * WEYHRAUCH to cause [Weyhrauch] to abuse his position and office as a member of the Alaska State Legislature, and to misuse his official authority for the benefit of [VECO]." *Id.* at 35-36. The government predicated federal jurisdiction over petitioner's allegedly fraudulent scheme on

petitioner's act of placing his resume and solicitation letter to VECO in the United States mails. *Id.* at 36-37.

4. Shortly before trial, the government indicated for the first time its intention to prove its allegation of honest services fraud not only under a quid pro quo theory, resting on proof of actual or promised compensation for misuse of official position, but under the distinct theory that a failure to disclose a conflict of interest, without more, could itself constitute a violation of § 1346. In a motion in limine filed a few days before the scheduled trial date, the government alleged that, without any showing of "an illegal financial transaction," *e.g.*, a bribe, "honest services fraud charges may be proven in at least two additional ways: (1) through proof that the public official knowingly concealed the existence of a conflict of interest or (2) through proof that the public official knowingly violated a state law." J.A. 41. According to the government:

> When a public official fails to disclose the existence of a conflict of interest or violates a state law in connection thereto, that public official can be found guilty of honest services fraud irrespective of whether the public official took any act thereafter, much less a fraudulent or harmful act.

Id. at 42. To prove up this nondisclosure theory, the government sought a ruling allowing the introduction of evidence to show that both defendants "violated their respective duties of honest services by knowingly concealing their respective conflicts of interest from the Alaska State Legislature and from the citizens of the State of Alaska, and by voting on

legislation that impacted the company with whom they were negotiating employment."[1] *Id.* at 39. To establish that the nondisclosure of the employment solicitation violated Alaska law, the government sought to offer four categories of evidence which it itemized in detail.[2] *Id.* at 39-40.

The government argued that the proposed evidence was relevant because petitioner was under a duty to disclose that he was "soliciting and negotiating for a job" with VECO, but failed to do so. J.A. 46. The government located petitioner's disclosure duty in Alaska Statute § 24.60.030(e)(3), which provides that a legislator may not "take or withhold official action or exert official influence that could substantially benefit or harm the financial interest of another

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[1] More specifically, the government sought an order "allowing [it] to present evidence of * * * defendant Weyhrauch's negotiation of future employment with 'Company A,' [his] duty (both express and implied) * * * to disclose such negotiations, [his] failure to disclose such negotiations, and [his] failure to cease voting on particular legislation as required under Alaska state law." J.A. 39. Neither a bribe nor any promise of favorable treatment played any part in the government's proposed proof under this nondisclosure theory.

[2] The proposed state law evidence included: (1) ethics publications produced and distributed by the legislature addressing conflict of interest and disclosure requirements; (2) testimonial evidence from a state employee who would testify that "members of the Alaska State Legislature customarily acknowledge the existence of conflicts of interests on the floor of the Legislature," and that such conflicts are recorded by the legislative body's clerk; (3) testimonial evidence from a state employee describing the "ethics training" that petitioner received; and (4) testimonial evidence that petitioner served on the legislature's Select Committee on Ethics. J.A. 39-40.

person with whom the legislator is negotiating for employment." *Id.*

On the same day that the government filed its motion in limine seeking admission of this evidence to prove its nondisclosure theory, petitioner filed his own motion in limine opposing the admission of the evidence on the dual grounds that the nondisclosure theory was a new one on which petitioner had not received prior notice, and that in any event it was foreclosed because the provisions of Alaska law relied upon did not give rise to any duty to disclose under the circumstances. J.A. 57-60.

5. The district court denied the government's motion in limine and granted petitioner's motion. *See* Pet. App. 22a. As a threshold matter, the court found that the government's indictment adequately alerted petitioner to the government's "alternative" nondisclosure theory of liability by alleging that petitioner deprived the State of Alaska of its right to honest services "free from deceit, self-dealing, bias and *concealment*." *Id.* at 29a-30a (quoting J.A. 35) (emphasis in original).

Nonetheless, the court agreed with petitioner that the government's nondisclosure theory was not tenable under the circumstances. The court stated that the government's theory supporting admission of the evidence depended "upon the existence of a legally recognized duty to disclose the alleged conflict of interest." Pet. App. 25a. The court disagreed with the government, however, that any such duty could be located in state law. Examining Alaska's legislative "Standards of Conduct" provisions, ALASKA STAT. § 24.60.010 *et al.*, the district court concluded that none of the disclosure obligations established by

state law "would apply to the circumstances here." *Id.* at 26a-27a.

With respect to the government's purported source of petitioner's disclosure duty, Alaska Statute § 24.60.030(c)(3), the court found that although the statute prohibits certain conduct, it contains no disclosure requirement. Pet. App. 25a. The court held that in light of numerous statutes with express disclosure requirements—which demonstrate that the legislature "knows how to establish a duty to disclose"—it would be inappropriate to imply a disclosure duty in Section 24.60.030 when none expressly exists. *Id.* at 26a. The court ruled that of the six provisions governing a legislator's standard of conduct that mandate disclosure, none applied under the facts of the case. *See id.*[3]

The district court also rejected the government's position that every legislator is subject to "an inherent fiduciary duty" to avoid conflicts of interest and to disclose such conflicts. Pet. App. 28a. The court held that even if such "salutary propositions" were recognized in state common law, Alaska's "Standards of Conduct" provisions expressly

[3] The six provisions specifically addressed by the district court include: ALASKA STAT. § 26.60.30(f) (duty to disclose membership on certain boards); *id.* § 26.60.040 (duty to disclose participation in certain state contracts or leases); *id.* § 26.60.050 (duty to disclose participation in non-exempt state programs and receipt of non-exempt state loans); *id.* § 26.60.070 (duty to disclose formation of close economic association involving a substantial financial matter with another legislator, legislative employee, or registered lobbyist); *id.* § 26.60.100 (duty to disclose information regarding legislator's representation of another before state entities); *id.* § 26.60.200 (comprehensive scheme for reporting certain financial transactions).

"supersede the provisions of the common law relating to legislative conflict of interest that may apply to a member of the legislature." *Id.* (quoting ALASKA STAT. § 24.060.020(b)).

The district court noted that "[n]o federal statute [was] cited" by the government as a source of petitioner's disclosure duty, and on that basis concluded that any claimed violation of the right of honest services "turns on whether federal common law may be used to provide the requisite duty to disclose." Pet. App. 30a. The district court answered this question in the negative, following the reasoning of the Fifth Circuit's en banc opinion in *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997), and holding on the present facts that "any duty to disclose sufficient to support the mail and wire fraud charges here must be a duty imposed by state law." *Id.* at 35a-36a. There being no such duty, the court concluded that its order left "the United States to prove up the honest services fraud charges in this case based [upon] violations of the law other than a duty to disclose [petitioner's] dealing with VECO." *Id.* at 36a.

6. Deeming the excluded evidence of "more critical relevance to defendant Weyhrauch than it is to defendant Kott," the government endorsed petitioner's motion to sever and appealed the district court's order as to petitioner.[4] Pet. App. 40a. Though

[4] During the pendency of petitioner's appeal, a jury acquitted Rep. Kott on the government's honest services charge, but convicted him of conspiracy, Hobbs Act extortion, and bribery concerning programs receiving federal funds. Rep. Kott appealed and two months after oral argument, but before the issuance of an opinion from the Ninth Circuit, the government

expressly declining to dispute the "district court's analysis of Alaska state law," the government argued on appeal that the district court's exclusion of its proposed evidence as proof of its new nondisclosure theory of honest services fraud "radically circumscribed the concept of honest services mail fraud." Brief of Appellant at 14-15, 16, *United States v. Weyhrauch*, No. 07-30339 (9th Cir. Feb. 1, 2008). While informing the Ninth Circuit that "[a]t trial, the United States also intends to prove * * * the attempted honest services count * * * on a bribery theory," *id.* at 12 n.4, the government argued that the district court's ruling improperly precluded it from proving that "Weyhrauch violated his duties of honest services by knowingly concealing his conflict of interest from the Alaska State Legislature and from the citizens of the State of Alaska," while "voting on legislation that impacted the company with whom he was negotiation for employment," *id.* at 13.

The government took the position that "the public is entitled not just to the right *decisions* by its elected officials, but also to a free and uncorrupted *process* by which those public officials take official actions. When a public official fails to disclose the existence of a conflict of interest, and takes action in his official

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moved to release Rep. Kott and to remand the case back to the district court because review of the government's files "uncovered material that, at this stage, appears to be information that should have been, but was not, disclosed to [Kott] before his trial." *United States v. Kott*, No. 07-30496, Motion to Remand (9th Cir. June 4, 2009).

capacity that relate to his conflict of interest, that public official has breached his duty to the public" in violation of § 1346. *Id.* at 24 (emphasis in original).

The United States Court of Appeals for the Ninth Circuit reversed and remanded the district court's exclusion order. The court acknowledged that "a literal reading of § 1346 might give federal prosecutors *unwarranted influence* over state and local public ethics standards," Pet. App. 13a (emphasis in original), and that an interpretation "requir[ing] the government to prove that a public official violated an independent state law" would address federalism concerns. *Id.* at 14a. But the Ninth Circuit nonetheless rejected the district court's conclusion that a § 1346 violation on the government's nondisclosure theory depends, in this case, on a violation of a state law disclosure duty. *Id.* at 12a, 14a.

In so ruling, the court stated that there is no indication that Congress intended "to condition the meaning of 'honest services' on state law," since doing so would mean "that conduct in one state might violate the mail fraud statute, whereas identical conduct in a neighboring state would not." Pet. App. 16a. Additionally, the court dismissed the district court's federalism concerns as unpersuasive, holding that the federal government has both the power to regulate use of the mails, and a legitimate "interest in establishing a uniform standard of conduct for public officials" and "in ensuring that state action affecting federal priorities is not improperly influenced by personal motivations of state policymakers and regulators." *Id.* at 21a. The Ninth Circuit thus concluded that § 1346 "establishes a

uniform standard for 'honest services' that governs *every* public official * * * and the government does not need to prove an independent violation of state law to sustain an honest services fraud conviction." *Id.* (emphasis in original).

Without defining the outer boundaries of the federal standard, the court held that Congress intended, at the least, to proscribe "(1) taking a bribe or otherwise being paid for a decision while purporting to [exercise] independent discretion and (2) nondisclosure of material information." Pet. App. 19a. The court concluded that petitioner's "alleged conduct falls comfortably within the two categories" and reversed the district court's exclusion order. *Id.* at 20a. The Ninth Circuit expressed no opinion on whether the proffered evidence is "relevant" to proving the government's § 1346 charge under the court's announced standard, however, and left that determination "to the district court's sound judgment." *Id.* at 21a.

SUMMARY OF ARGUMENT

The decision of the court below held that 18 U.S.C. § 1346, which extends the coverage of the federal mail and wire fraud statutes to schemes to defraud involving the intangible right of honest services, mandates a "uniform federal" common law of the disclosure duties of state officials. That ruling is incorrect for numerous reasons. Instead, this Court should hold that a state official's failure to disclose a conflict of interest can never, standing alone, constitute a violation of the right of honest services, if it does not violate a clear legal duty separate and apart from § 1346.

The decision of the Ninth Circuit embodies a very implausible reading of the statute's words. Taking § 1346's critical words in order, the statute reaches only "schemes to defraud" of a right of honest services, and this Court has made abundantly clear that there can be no fraud resulting from a nondisclosure absent a duty to disclose. The statute further refers to a "right" of honest services that is being denied, and any legal right likewise depends on a duty to be borne by another. Additionally, the intangible right at issue is one related to "services," which is itself a reference to obligations arising from, and most commonly defined by, an employment relationship. The statute thus appears to require fraudulent activity aimed at denying an existing legal right to the performance of duties to provide defined services. It is not enough that an official's conduct, though otherwise entirely legal, falls short of requirements of forthrightness and transparency propounded by the federal courts on a case-by-case basis.

Where, as here, the particular position of a state legislator is at issue, the principal duties whose fraudulent denial might present a case under § 1346 will likely be duties defined by state law. As the district court held, and the government did not challenge on appeal, nondisclosure of the employment discussions at issue here violated no requirement of Alaska law. And the government has never suggested any violation of federal law distinct from § 1346. Thus the only possible source of a relevant disclosure duty is the "uniform" body of federal common law recognized by the court below.

In addition to the statute's words, the court of appeals' invocation of federal common law offends several well-established canons of construction.

First, it violates this Court's clear statement rule. Reading the single sentence of § 1346 as a delegation to federal prosecutors and federal judges of the task of defining conflict of interest disclosure duties of state officials would substantially impact each state's ability to establish its own governing framework. These are important policy judgments for the state itself to make. The notion that Congress, by implication from the words of § 1346, intruded itself into this area is directly at odds with this Court's requirement that Congress must speak in unmistakable terms when it wishes to legislate in sensitive areas in ways that affect the federal-state balance.

Second, the Ninth Circuit's ruling offends the principle that a criminal statute must give fair warning of the conduct to which it applies. Allowing federal courts to levy criminal penalties for a state official's nondisclosures based on a developing common law, in the absence of any preexisting legal duty, denies any reasonable notice of what the law requires, and invites arbitrary and abusive enforcement practices.

Finally, should the Court find the statute ambiguous even after applying the clear statement rule and the doctrine of avoidance, as petitioner submits it is not, the rule of lenity requires this Court to read the statute narrowly. A reading that allows prosecutions based on disclosure duties formulated by federal courts, without a basis in any clear

preexisting legal requirement, would offend this principle of narrow construction.

Apart from the statute's language and these three canons of construction, the Ninth Circuit's recognition of a federal common law of state officials' disclosure duties is sharply at odds with this Court's cases on the role of federal common law. Apart from the rare case where Congress expressly mandates that a given area of law be placed in the hands of the federal courts, recognition of federal common law is only appropriate in those instances where a failure to do so would undermine an important federal policy. No such federal interest is remotely at stake where the issue is the types of perceived conflicts of interest that a state official should be required to disclose. Indeed, it is completely at odds with the oft-stated principle that there is no federal common law of crimes.

Nothing in the nearly nonexistent legislative history of § 1346 lends any support to the decision below. While there is a single statement by one senator, made after the statute was enacted, suggesting that § 1346 was intended to "reinstate all of the pre-*McNally*" case law, that statement deserves little weight, and in any event would lead to an incoherent reading of the statute. As the court below, among many others, has noted, the pre-*McNally* case law is inconsistent. Any notion that its incorporation by reference offers a reasonable basis on which to rest future application of § 1346 is thus wholly without merit.

Finally, the proper, vigorous enforcement of the statute is not at all threatened by the rejection of a federal common law of state officials' disclosure

duties, and the concomitant recognition that honest services nondisclosure prosecutions depend on the fraudulent breach of clear legal duties separate from § 1346. It is fully consistent, for example, with prosecuting public officials for taking a bribe or self-dealing. Such action may deny honest services when it involves a departure from identifiable duties owed in the course of one's job, such as the duty to let a contract to the lowest bidder or on an impartial assessment of qualifications to perform the work. And when that misfeasance is pursued surreptitiously to conceal the wrongdoing, it can fairly be regarded as fraudulent.

ARGUMENT

I. THE LANGUAGE OF 18 U.S.C. § 1346 DOES NOT AUTHORIZE PROSECUTIONS OF STATE OFFICIALS WHERE THE WRONG ALLEGED IS SIMPLY A FAILURE TO DISCLOSE PERCEIVED CONFLICTS OF INTEREST AND THE NONDISCLOSURE VIOLATES NO EXISTING LEGAL DUTY TO DISCLOSE SEPARATE AND APART FROM § 1346

Section 1341 of Title 18 makes it a criminal offense for a person to utilize the mails in furtherance of a "scheme or artifice to defraud." Under § 1346, "scheme or artifice to defraud" includes a "scheme * * * to deprive another of the intangible right of honest services."

Analysis of any statutory provision of course begins with an examination of its words.[5] *See Dean v.*

[5] The petitioners in *Black v. United States*, contend that by using the phrase "right of"—rather than "right to"—"honest services," Congress signaled its intent to codify a term of art, not

United States, 129 S. Ct. 1849, 1853 (2009). In general, where those words have an ordinary meaning, that meaning will be viewed as expressing the legislative purpose. *See Engine Mfrs. Assn. v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). Interpretation of a word or phrase depends

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subject to analysis by deconstruction of its separate words. Brief of Petitioners at 24 n.9, *Black v. United States*, No. 08-876 (July 30, 2009). But Congress's use of the preposition "of" is a weak justification to abandon traditional methods of statutory interpretation. Legislative bodies routinely confer rights on recipients using the formulation "right of [noun]" without intending to signal the use of a term of art. Thus, when the Court confronts the scope of the phrase "rights of custody," as used in the Hague Convention on the Civil Aspects of International Child Abduction, next Term in *Abbott v. Abbott*, No. 08-645, *cert. granted*, 129 S. Ct. 2859 (2009), it will not be precluded from analyzing the meaning of the word "custody" in isolation. *See Croll v. Croll*, 229 F.3d 133, 138 (2d Cir. 2000) ("We open the dictionary to find the ordinary meaning or meanings of 'custody.'").

Given that a computer search reveals that before *McNally* no court had used the formulation "intangible right of honest services," the *Black* petitioners' view that Congress intended it to be interpreted as an inseverable phrase is particularly unpersuasive. The more plausible explanation for Congress's rather unusual verbiage is that § 1346 evolved from a precursor statute, the Fraud Amendments Act of 1987, that proposed criminalizing the defrauding of another "of intangible rights *of* any kind whatsoever in any manner or for any purpose whatsoever." *See* 133 Cong. Rec. S16742-03 (daily ed. Nov. 30, 1987) (statement of Sen. Specter) (emphasis added). In all likelihood, subsequent proposals kept the Fraud Amendments Act's grammatical structure, but lessened its scope from schemes depriving another of intangible rights "of any kind," to schemes that deprive another of the right "of honest services."

upon reading the whole statutory text, including its purpose, and consulting any precedents or authorities that inform the analysis. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006).

Congress enacted § 1346 in direct response to this Court's holding in *McNally* that § 1341 extends only to fraud involving property "to cover [the intangible right to honest services] that lower courts had protected under [18 U.S.C.] § 1341 prior to *McNally*." *Cleveland v. United States*, 531 U.S. 12, 19-20 (2000). While that general intention does not illuminate the character or extent of the "schemes to defraud" of "intangible rights" that the statute encompasses, a careful reading of the statute's words lends weight to petitioner's reading.

First and foremost, § 1346 did not eliminate the requirement of a "scheme * * * to defraud." Thus, to prosecute a state public official for honest services fraud under a nondisclosure theory, the government must prove not only that the official violated some disclosure obligation, but also that the defendant acted with an intent to defraud, *Carpenter v. United States*, 484 U.S. 19, 28 (1987), that the nondisclosure was material, *Neder v. United States*, 527 U.S. 1, 20 (1999), and, arguably, that the victim suffered pecuniary harm, *United States v. Rabbitt*, 583 F.2d 1014, 1026 (8th Cir. 1978). It appears, for example, that a federal judge does not defraud the public of its right to honest services merely because, in objection to the burden of filling out his statutorily-required

financial disclosure form, he refuses to comply and mails in a blank form in protest.[6]

The requirement to prove fraud is of particular relevance where the alleged misconduct is a failure to disclose. As this Court stated in *Chiarella v. United States*, 445 U.S. 222, 227-28 (1980), "[a]t common law * * * one who fails to disclose material information * * * commits fraud only when he is under a duty to do so."[7] Such a duty to disclose may arise in a

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[6] The question whether a knowing act of nondisclosure by a person required to disclose, standing alone, can constitute a "scheme to defraud" of the "right of honest services," is not encompassed within the Question Presented, but is closely related to the issue in this case. Petitioner submits that where the government is unable to show that an act of concealment, however improper, is itself a means of facilitating some other improper end—the securing of bribes, acts of self-dealing, or the outright misappropriation of another's assets—the acts of nondisclosure themselves are simply violations of disclosure duties and not part of any scheme to defraud. Since the government's allegation against petitioner in its alternative theory at issue here involves nothing more than failing to make a certain public disclosure while he went about the performance of his legislative duties, petitioner submits that the honest services fraud charge could have been dismissed because the government has failed to allege fraud.

[7] In *Chiarella*, a printer traded securities based on material, non-public information he had learned in the course of his job. *Chiarella v. United States*, 445 U.S. 222, 224 (1980). He was convicted under SEC Rule 10b-5 (17 C.F.R. § 240.10b-5) of "employ[ing] [a] device, scheme, or artifice to defraud" in connection with the sale of a security, on the theory that trading on non-public information is *per se* fraudulent. *Id.* at 225-26. In reversing, this Court pointed out that "not every instance of financial unfairness constitutes fraudulent activity," and that silence cannot create fraud absent a duty to disclose. *Id.* at 232. Because the jury had not been presented with a theory

number of ways, but the Court's reasoning in *Chiarella*, refusing to imply a general duty to disclose material non-public information in an area governed by "detailed and sophisticated regulation," *id.* at 232, is instructive here. Where Alaska itself has enacted detailed provisions on the ethical and disclosure duties of its officials, the violation of some as yet unidentified and broader federal common law duty can hardly be deemed fraudulent. The requirement of a "scheme to defraud" thus strongly suggests that an independent, preexisting duty to disclose, arising under either state or federal law, is essential to any successful honest services prosecution resting on an alleged failure to disclose.[8]

This conclusion based on the requirement of a "scheme to defraud" is greatly reinforced by the fact that such liability requires deprivation of an intangible "right." In other words, a legislator's constituents can only be victims of mail fraud if they were deprived of a service to which they have a "just

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regarding the nature or elements of Chiarella's duty to disclose, the Court refused to affirm his conviction. *Id.* at 236-37.

[8] Because the government must, in every case, show fraud in order to establish a § 1346 violation, the meaning of the word "honest" as used in the phrase "right of honest services" must be read to harmonize with that requirement. This is easily done by construing it to mean "free from fraud or deception," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1086 (1986); 7 OXFORD ENGLISH DICTIONARY 349 (2d ed. 1989) ("free from fraud"); BALLANTINE'S LAW DICTIONARY 566 (3d ed. 1969) ("descriptive of one who does not lie or cheat").

or legal title or claim." WEBSTER'S II NEW COLLEGE DICTIONARY 977 (3d ed. 2005) (definition of "right"). Common sense would dictate that absent a clear, affirmative duty of petitioner to disclose particular information to his constituents, they did not have a "right" to the information. *See Ullmann v. United States*, 350 U.S. 422, 427 (1956) ("rights and duties are correlative") (quotation marks and citation omitted); John Chipman Gray, THE NATURE AND SOURCES OF THE LAW 8-9 (2d ed. 1921) ("Right is a correlative to duty; where there is no duty there can be no right."). In this case, "[s]tate law governing public officials' conduct" will usually create "the correlative duty that establishes the right." George D. Brown, *Should Federalism Shield Corruption?*, 82 CORNELL L. REV. 225, 283 n.491 (1996). Thus, the most natural reading of § 1346 is that a public official can only be guilty of mail fraud for failure to disclose conflicts of interest if he violates a duty to disclose that information.

The word "service" further connotes an established set of duties arising from some relationship—most often one of employment. WEBSTER'S II NEW COLLEGE DICTIONARY 1033 (3d ed. 2005) ("service" means "[e]mployment in duties or work for another, esp. for a government"); Henry Campbell Black, A DICTIONARY OF LAW 1083 (1891) (defining "service" as "[t]he being employed to serve another; duty or labor to be rendered by one person to another"). Because a "service" is a "duty" owed by one party to another—typically as the consequence of an employment relationship—it is reasonable to infer that Congress intended to limit liability under § 1346 to situations where an employee or state official violates a

disclosure duty arising in connection with the employment relationship.

The Question Presented as restated by the Court asks, more specifically, whether the violated disclosure duty must be "imposed by state law." The answer to that question, on the record in this case, is plainly in the affirmative. Because the office of a state official is a construct of state law, its duties are defined primarily, if not exclusively, by reference to state law. *See Brumley*, 116 F.3d at 734. As importantly, though, as the district court expressly found, the government has failed to reference any arguably applicable disclosure duty under federal law, apart from § 1346. *See* Pet. App. 30a. There is therefore no occasion in this case to consider the extent of federal authority to statutorily impose disclosure duties on state officials.

Accordingly, while the language of § 1346 is less than crystal clear in specifying exactly the conduct it is intended to reach, it strongly indicates that nondisclosures may be actionable only where they violate an established duty to disclose, under state or federal law, apart from § 1346 itself. Since the government has alleged no such provision of federal law, it can only arise under state law and the Question Presented must be answered "yes."[9] The

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[9] The course of incorporating state law as a federal rule of decision has often been adopted by this Court. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979) ("[W]here there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision."). That is true even if reference to preexisting state standards will produce non-uniform results when the statute is applied in different states.

decision of the court below reaching a contrary conclusion thus "slight[s] the wording of the statute." *Williams v. United States*, 458 U.S. 279, 286 (1982).

II. THE NINTH CIRCUIT'S READING OF § 1346 TO MANDATE A FEDERAL COMMON LAW OF STATE OFFICIALS' DISCLOSURE DUTIES VIOLATES SEVERAL ESTABLISHED CANONS OF CONSTRUCTION

Three canons of construction support petitioner's view that in cases based on the government's "alternative" nondisclosure theory, § 1346 requires evidence that the defendant breached a disclosure obligation under either state law or under federal law

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For example, in civil rights actions, federal courts look to state law limitation periods as the relevant statute of limitations since the federal statutes provide no such period. *See, e.g., Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). In bankruptcy, notwithstanding the constitutional directive to establish "uniform laws * * * through the United States," U.S. CONST. Art. I., § 8, cl. 4, this Court has held that the applicability of a security interest to rents and profits derived from collateral should be resolved by reference to state law, rather than by creation of a uniform federal rule. *Butner v. United States*, 440 U.S. 48, 55-56 (1979). In copyright, this Court has likewise held that an illegitimate child's qualification to renew a deceased parent's copyright under 17 U.S.C. §1, *et seq.*, is governed by separate state laws on the rights of such children. *DeSylva v. Ballentine*, 351 U.S. 570, 580-81 (1956). More generally, federal courts have also regularly looked to state law when a federal statute implicates ownership or property. *See, e.g., United States v. Capital Tax Corp.*, 545 F.3d 525, 532 (7th Cir. 2008) (declining to adopt a federal rule for equitable conversion under CERCLA and instead "look[ing] to state law for guidance in interpreting the [federal] statute").

separate and apart from 18 U.S.C. § 1346: the clear statement rule, the doctrine of constitutional avoidance, and the rule of lenity. Adopting respondent's contrary interpretation results in the kind of intrusive, vague, and grievously ambiguous criminal statute that these canons presume Congress did not intend.

A. Reversal Of The Decision Below Is Compelled By The Well-Established Principle That Congress Must Speak Clearly When It Acts In A Way That Invades The Usual Prerogatives Of The States

When an interpretation of a federal statute would "upset the usual constitutional balance" between the federal government and the states, the Court has required "unmistakably clear" statutory language before it adopts that interpretation. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quotation and citation omitted). This principle applies when Congress legislates in "traditionally sensitive areas" that "affec[t] the federal balance." *United States v. Bass*, 404 U.S. 336, 339 (1971). The prosecution of state officials for acts of public corruption "is perhaps the most sensitive area of potential federal-state conflict." Charles F.C. Ruff, *Federal Prosecution of Local Corruption*, 65 GEO. L.J. 1171, 1216 (1977). Interpreting § 1346 as a mandate for federal prosecutors and federal courts to develop from scratch a common law of the disclosure duties of state officials would alter the federal-state balance by dramatically expanding the criminal jurisdiction of the federal government. Such an expansion would require a clear indication that Congress so intended,

and there is none to be found in the twenty-eight words that compose § 1346.

1. The clear statement rule protects the states' "substantial sovereign powers" in our federal system, *Gregory*, 501 U.S. at 461, and "assures" that Congress "faced, and intended to bring into issue," the relative powers of the federal government and the states. *Bass*, 404 U.S. at 349. The importance of the clear statement rule in the context of federal prosecution of state and local officials cannot be doubted. *See* Brown, *Should Federalism Shield Corruption?*, 82 CORNELL L. REV. at 228 ("Constitutional and policy issues concerning the proper scope of federal criminal law—substantial ones to begin with—are particularly sensitive when the defendants are state and local officials."). State governments have primary responsibility to set the performance standards and ethical responsibilities of their own officials. *See Gregory*, 501 U.S. at 460 ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."); *see also Evans v. United States*, 504 U.S. 255, 290 (1992) (Thomas, J., dissenting) (public corruption by state and local officials is "a field traditionally policed by state and local laws"). And the federal government cannot prosecute omissions to disclose that are fully consistent with state law without "foreclos[ing the State] from experimenting and exercising [its] own judgment in an area to which States lay claim by right of history and expertise." *United States v. Lopez*, 541 U.S. 549, 583 (1995) (Kennedy, J. concurring).

The imposition of disclosure duties based on a gauzy federal vision of what good government requires is especially offensive on the facts of this case. In 1984, Alaskans voted to amend the state constitution to limit the length of the legislative session to 120 calendar days. *See* ALASKA CONST. art. II, § 8 (amended 1984). The purpose of the amendment was to permit "citizens who undertake public service" to have "employment outside the legislature" and enable public officials "to return to private sector jobs and families." ALASKA STATE GOVERNMENT AND POLITICS 243 (Gerald A. McBeath & Thomas A. Morehouse eds., 1987). In combination with strict limits on pay and a shortened session, the voters' election to govern through legislators who are simultaneously employed in both the public and private sectors promotes Alaska's interest in a legislature with a low degree of "professionalism."

In turn, Alaska's disclosure rules advance the State's allegiance to a model of governance by citizens. Because the Alaska citizenry's "commitment to a part-time citizen legislature implies that legislators are expected and permitted to earn outside income," the statutes establishing "Standards of Conduct" for Alaskan legislators do "not impose unreasonable or unnecessary burdens that will discourage citizens from entering or staying in government service." ALASKA STAT. § 24.60.010(4). To that end, Alaska's disclosure provisions require that state legislators disclose *actual* conflicts-of-interest resulting from dual employment, but not *potential* conflicts-of-interest. *See* ALASKA STAT. § 24.60.200. Thus, a state legislator must disclose when he receives more than $5,000 in compensation for "personal services" from an entity "known to have

a substantial interest in legislative * * * action." *Id.* § 24.60.200(a)(2). But no companion provision mandates disclosure of possible *future* compensation.

By seeking to prosecute petitioner under § 1346 for failing to disclose potential future employment—conduct found by the district court to be lawful under all provisions of law cited by the government, which ruling the government did not appeal—respondent acts in contravention of the State's expressed policy choices. It is difficult to imagine a more direct assault on comity and the benefits that flow from our federalist structure, including sensitivity to the diverse needs of a heterogeneous society and innovation and experimentation in government. *See Gregory*, 501 U.S. at 458 (citation omitted).

2. Twice before, this Court has invoked the clear statement rule to limit the reach of the mail fraud statute. In *Cleveland v. United States*, 531 U.S. 12 (2000), the Court was faced with the question whether state gaming licenses constituted property within the coverage of the federal mail fraud statute. Because such a conclusion would have involved the federal government in regulating a broad range of conduct traditionally regulated by the states, the Court invoked the clear statement rule and found no such statement to exist. *Id.* at 24.

And in *McNally*, the Court interpreted 18 U.S.C. § 1341 as limited in scope to the protection of property rights "[r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials[.]" 483 U.S. at 360. In a footnote with particular relevance to this case, the majority

cautioned that although Congress "may well" criminalize a state official's conduct even though such conduct is either permitted or not expressly forbidden by state law, "it would take a much clearer indication than the mail fraud statute evidences[.]" *Id.* at 361 n.9.

This "much clearer indication" of an intention to let federal courts override state disclosure rules through a body of federal common law cannot be found in the text of § 1346. The one-sentence statute makes no mention of any intention to create such a uniform federal standard. Nor does it reference any overriding federal interest that might arguably justify such actions. Thus, while the statute's prompt enactment manifests a clear intention to reverse *McNally*'s holding by extending the mail fraud statute to cover the intangible right of honest services, it contains no statement, clear or otherwise, that federal courts should develop a common law of the disclosure obligations owed by state officials.

B. It Is Further Compelled By The Principle Of Constitutional Avoidance, So That The Statute Is Not Rendered Void For Vagueness

If the disclosure obligations owed by a state official under § 1346 are not defined by reference to independent disclosure duties otherwise existing in the law, the statute's potential reach becomes almost unbounded. This Court has long recognized the "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime." *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964); *see also United States v. Reese*, 92 U.S. 214, 220 (1926) ("Every man should be able to know with certainty when he is committing a crime."). A statute is void

for vagueness if the statute either "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008) (citations omitted). Allowing federal common law to define the disclosures that must be made in order to avoid prosecution for denial of "honest services" would fail both prongs of this Court's vagueness test.

1. Interpreting a legislator's disclosure duties under an ever-evolving and amorphous common law standard would not "enable ordinary people to understand what conduct [the statute] prohibits." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion). Section 1346 specifies that a "scheme to defraud" includes the deprivation of another's "intangible right of honest services," and in that way expresses legislative intent to expand the offense beyond deprivations of money or property; but it does not say what "honest services" may be, or when they are withheld deceitfully.

In the political sphere, the line that separates political patronage from political corruption is "blurred and shifting." Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. LEGIS. 153, 195-96 (1994). Generally, local and state politicians rely on their ethics rules to demarcate the boundaries that separate the two. Allowing federal prosecutors, judges, and juries to decide *ex cathedra* when the line of propriety has been crossed would create a level of uncertainty that is intolerable.

This case powerfully demonstrates that § 1346 fails to provide fair warning to potential defendants. Petitioner, who as a member of the Select Committee on Ethics in the Alaska State Legislature was familiar with the State's ethics framework, complied with all applicable state laws when he solicited employment from VECO. The government contends that despite the legality of petitioner's conduct under state law, petitioner had fair warning that his conduct violated the federal mail fraud statute. But even now that petitioner has been charged, the government has failed to provide a concise explanation for what petitioner was required to do to comply with the honest services statute. What exactly did petitioner need to disclose, and when? To whom was disclosure necessary? Would a press release have sufficed, or was more required? Answers to these questions are nowhere to be found in the "amorphous and open-ended," *United States v. Bloom*, 149 F.3d 649, 654 (7th Cir. 1998), "inconclusive," Pet. App. 12a, and "vague and undefined," *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008), language of § 1346.

2. A common law definition of disclosure obligations would also "encourage[] seriously discriminatory enforcement." *Williams*, 128 S. Ct. at 1835. Vague statutes violate due process by placing "unfettered discretion" in the hands of law enforcement, thereby permitting or even encouraging arbitrary, discriminatory enforcement. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168 (1972). By unmooring § 1346 from a specific, independent disclosure obligation, the court of appeals' interpretation "invites abuse by headline-grabbing prosecutors in pursuit of local officials, state

legislators, and corporate CEOs." *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari). Under the court of appeals' view of the statute, prosecutors bent on making a splash have enormous leeway to implement their vision of an "uncorrupted process" by which public officials should be required to "take official action." Brief of Appellant at 16, *United States v. Weyhrauch*, No. 07-30339 (9th Cir. Feb. 1, 2008).

The risk of arbitrary and discriminatory enforcement is further heightened where, as here, prosecutorial decisions arise in the context of a larger investigation with major implications for the careers of highly-visible, established political figures. Indeed, the relatively benign character of allegations leveled against petitioner in this case raise substantial doubt about whether petitioner would have even been charged had the employer he solicited not had substantial ties to the ill-fated prosecution of Senator Stevens. *See* Neil A. Lewis, *Justice Dept. Moves to Void Stevens Case*, N.Y. TIMES, Apr. 1, 2009, at A1.

C. If The Court Finds The Statute Ambiguous, The Rule Of Lenity Also Requires That Violations Based On Nondisclosure Rest On A Preexisting Duty To Disclose Separate From § 1346

Even if the clear statement rule and the avoidance doctrine did not cure the ambiguity concerning § 1346's ambit, the rule of lenity would require the Court to reject the government's interpretation of the honest services statute as making the disclosure obligations of state officials a matter of federal common law. This Court recently reaffirmed the

principle that "[u]nder a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (citations omitted).

The rule of lenity operates only when a substantial doubt over the meaning of a statute remains after all other applicable canons of construction have been exhausted. *See United States v. Shabani*, 513 U.S. 10, 17 (1994). When such a doubt remains, however, this Court has not hesitated to apply the rule in recognition of the fundamental values it protects:

> [The rule] is founded on two policies that have long been part of our tradition. First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.

Bass, 404 U.S. at 348 (quotation marks, citations and footnote omitted).

In *McNally*, the Court held that when the federal mail fraud statutes can be read in one of two rational ways, "we are to choose the harsher only when Congress has spoken in clear and definite language." 483 U.S. at 359-60 (citing *Bass*, 404 U.S. at 347). The Court applied the rule of lenity in *McNally* to avoid

an interpretation that construed § 1341 "in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials[.]" *Id.* at 360. Yet when faced with two rational interpretations of § 1346, the Ninth Circuit chose the one that leaves the statute's outer boundaries indefinite and permits federal prosecutors and federal courts to promulgate an ethical regime for state employees.

III. THE NINTH CIRCUIT'S RECOGNITION OF A FEDERAL COMMON LAW GOVERNING STATE OFFICIALS' DISCLOSURE DUTIES IS WRONG UNDER THIS COURT'S MANY CASES ADDRESSING THE RULE OF FEDERAL COMMON LAW

There is no dispute in this case that petitioner did not violate a single federal statute, state statute, or written rule of ethics applicable to members of the Alaska legislature when he did not disclose his employment solicitation. Nor did he violate any duty imposed by Alaska's *common* law, which was superseded by the state's statutorily-codified legislative conduct scheme. In ruling that the disclosure duties whose violation may trigger the application of § 1346 must be defined by a "uniform [federal] standard for 'honest services' that governs *every* public official" (Pet. App. 21a), the Ninth Circuit has thus called for the creation of federal common law criminalizing conduct. That holding must be reversed because the duties of state officials to disclose conflicts of interest is not one of the "few and restricted" areas where it is appropriate for federal courts to create federal common law.

Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963). To the contrary, it is black letter law that federal courts cannot create common law crimes, *see, e.g., United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812), and that is what the Ninth Circuit has done in this case.

"Federal courts, unlike state courts, are not general common-law courts and therefore do not possess a general power to develop and apply their own rules of decision" to the cases before them. *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981). In order to cabin the "runaway tendencies" of a federal common law "untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy," *O'Melveny & Meyers v. F.D.I.C.*, 512 U.S. 79, 89 (1994), this Court has recognized federal common law only in very limited circumstances. *See Miree v. DeKalb County*, 433 U.S. 25, 32 ("[T]he issue of whether to displace state law [with federal common law] * * * is primarily a decision for Congress."). Those rare instances are: (1) where Congress clearly empowers the courts to develop a uniform federal policy designed to displace state law with federal law (*see, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987)); or (2) where there is a "direct conflict between federal and state law" that implicates "uniquely federal interests" (*Boyle v. United Tech. Corp.*, 487 U.S. 500, 504 (1988)). This case falls in neither category.

There is no evidence, and the government has never argued, that the first exception applies here. It does not come into play simply because a federal statute is involved, but only when Congress creates a comprehensive federal statutory regime intended to

unify the law in pursuit of some federal interest. *See Pilot Life Ins. Co.*, 481 U.S. at 46-47, 54-57. Certainly that did not occur here.

Nor is there any identifiable conflict between state and federal law to support implication of federal common law on the second ground. If a state law can be enforced without somehow impairing a uniquely federal policy or interest, the two regimes do not truly conflict and there is no argument for displacing state law with federal common law. *O'Melveny & Meyers*, 512 U.S. at 87 ("Our cases uniformly require the existence of [a significant] conflict as a precondition for recognition of a federal rule of decision."); *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966) ("In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown."); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963) (upholding California standard for avocado sales that differed from the federal standard where both could be enforced simultaneously).

After weighing competing policy interests, Alaska has determined that requiring its legislators to disclose *potential* conflicts of interest is not the best way to maintain a strong, well-functioning state legislature. That determination offends no identifiable federal interest. To the contrary, it advances the well established federalism interest in allowing the laboratories of the fifty states to experiment with a variety of governmental

approaches. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Regulation of the conduct of state officials is, of course, primarily the concern of the states themselves. *See Brumley*, 116 F.3d at 734. And criminal law is an area traditionally created and enforced by the states. *Lopez*, 514 U.S. at 561 n.3 (collecting cases). In fields of law that states have traditionally occupied, the conflict between state and federal policies must be particularly sharp to justify federally pre-empting state law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The only federal interests that the Ninth Circuit could identify in regulating the conduct at issue here were purely speculative. *See* Pet. App. 18a. The panel below opined that because state regulation of certain industries "*can* have national or international implications," the federal government "*may* wish to prevent" improper influence by creating uniform disclosure obligations. *Id.* (emphasis added). That is precisely the sort of abstract, remote, and conjectural federal interest that this Court has categorically rejected as a basis for federal common law. *Miree*, 433 U.S. at 32-33.

The rationale is particularly unpersuasive in that no one even argues that Alaska's disclosure regime, and others like it, have produced legislation somehow adverse to the interests of the United States. or, if it has, that common law relating to the mail fraud statute would prevent the problem. For those reasons alone, no "uniform federal law" is called for here. In *Atherton v. F.D.I.C.*, 519 U.S. 213 (1997), the Court refused to create federal common law relating to the duty of care owed by officers of

federally chartered and insured financial institutions, partly because there was no showing that applying state law had actually threatened any federal interest. *Id.* at 219, 225. Similarly, in *Wallis*, the Court did not create federal common law to address claims related to land owned and leased by the federal government where "there has been no showing that the state law is not adequate to achieve" the federal government's policy interests. 384 U.S. at 63. Surely the potential harms to the federal government in those cases were far greater than any abstract federal interest in the proper amount of public disclosures by state legislators. Pet. App. 17a-18a.

Moreover, the disclosure duties of state officials are a matter of peculiar, if not unique, interest to the states. That subject is far removed from any issue concerning "the primary conduct of the United States or any of its agents or contractors," as to which this Court has most commonly found the sort of "unique federal interest" justifying federal common law. *See Miree*, 433 U.S. at 28-29 (declining to create federal common law where the case presented "no question[s] regarding the liability of the United States or the responsibility of the United States"). The conclusion that § 1346's opaque words are a mandate for a uniform federal common law of state officials' disclosures is thus inconceivable, given the primary state interests and virtually nonexistent federal interest at issue.

That conclusion is inconceivable for another reason as well. This Court has repeatedly reiterated that there is no federal common law of crimes. *See, e.g.*, *United States v. Oakland Cannabis Buyer's Co-op.*,

532 U.S. 483, 490 (2001) ("federal crimes are defined by statute rather than by common law"); *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997) ("Federal crimes are defined by Congress, not the courts."); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994) ("there is no federal common law of crimes"); *Hudson*, 11 U.S. (7 Cranch) at 33 (same). That longstanding proposition rests on an array of concerns, some of which are developed elsewhere in this brief. *See* Parts II.A-C. Yet by construing § 1346 as a directive to federal courts to create a uniform federal law of state officials' disclosure duties, whose violation is enforceable as a federal felony, the Ninth Circuit has directly offended this longstanding principle.

IV. THE LEGISLATIVE HISTORY LENDS NO SUPPORT TO THE DECISION BELOW

For all of the reasons set forth above, § 1346 requires, at a minimum, the violation of a preexisting duty to disclose in order to support prosecution of a state official for a simple failure to disclose a conflict of interest. While, on that basis, it is arguably unnecessary even to inquire into the relevance of legislative history, *see Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001), the scant history of the statute suggests no contrary reading.

A. The Sparse Legislative History Of § 1346 Provides No Useful Guidance For The Proper Interpretation Of The Statute

When resolution of a question of federal law turns on the meaning of a statutory term, the Court may look to legislative history if the statutory language is unclear. *See Blum v. Stenson*, 465 U.S. 886, 896

(1984). But reliance on legislative history for the purpose of divining legislative intent is "a step to be taken cautiously." *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 26 (1977).

There are only two items of legislative history pertinent to the text of § 1346 as actually passed. First, on the day that the Omnibus Drug Bill, including the section that added § 1346 to Title 18, was enacted, Rep. Conyers offered remarks on the floor of the House. He noted that before *McNally*, the mail and wire fraud statutes were interpreted to "protect the right of the public to the honest services of public officials and others responsible for the conduct of public or public affairs, the right of a member of an organization to the honest services of the leaders of that organization, and the right of employers to the honest service of their employees." *See* 134 Cong. Rec. H11108-01 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers) (internal citations omitted). The purpose of the amendment, according to Rep. Conyers, was to "restore[] the mail fraud provision to where that provision was before the *McNally* decision" by making it "no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property." *Id.* Rep. Conyers stated, "no other change in the law is intended." *Id.*

Rep. Conyers' statement confirms that Congress intended to overturn *McNally*'s distinction between tangible and intangible rights. Yet he expressed no view on the scope of the "honest services" covered by the statute or the source of the duties owed by state legislators. Accordingly, the House legislative history

has no bearing one way or the other on the question presented here.[10]

Second, several weeks after the passage of the statute, Senator Biden entered a report into the Congressional Record stating:

> This section overturns the decision in *McNally v. United States* in which the Supreme Court held that the mail and wire fraud statutes protect property but not intangible rights. Under the amendment, those statutes will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change.

134 Cong. Rec. S17360-02 (daily ed. Nov. 10, 2008) (statement of Sen. Biden). Such "post *hoc* statements of a congressional Committee are not entitled to much weight." *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982). In any event, the glib assertion that § 1346 simply reinstated all of the pre-*McNally* caselaw wholesale is incoherent, because, as discussed below in Part IV.B, that caselaw was fractured and inconsistent.

Nowhere in the entirety of § 1346's legislative history did any congressman address the source of any disclosure duties whose violation by a state

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[10] Rep. Conyers was one of eleven Representatives to vote against the omnibus drug bill, *see* 134 Cong. Rec. H11108-01 (daily ed. Oct. 21, 1988) (roll call of votes), but he supported the inclusion of § 1346.

official could violate the "right of honest services." The legislative history is thus of little use as an aid in interpreting the words of the statute in the context of this case.

B. Any Effort To Implement A Statutory Intent To "Reinstate All Of The Pre-McNally Case Law" Would Render The Statute Incoherent

In addition to the fact that Senator Biden's *post-hoc* assertion of an intent to "reinstate all" pre-*McNally* case law is entitled to little, if any, deference, any judicial effort to implement it would be frustrated by substantial inconsistencies in that existing case law. While the Court below rested its decision in substantial part on Congress's "clear intent to reinstate the line of pre-*McNally* honest services cases," Pet. App. 17a, it did so only after discussing at some length the "divergent views" of various circuits "on the proper meaning of 'honest services'" for public officials. *Id.* at 12a; *see id.* at 13a-17a.

The Ninth Circuit is hardly the first to recognize that the pre-*McNally* cases fall far short of establishing a "uniform set of rules." *Brumley*, 116 F.3d at 733; *see also* Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1, 16 (1998) (pre-*McNally* "decisions do not provide a consistent definition of honest services fraud").

The lack of coherence in the body of pre-*McNally* law is illustrated by the attempt of the *en banc* Second Circuit Court of Appeals to divine a standard set of rules from the pre-*McNally* precedent in the context of private-sector honest services cases. *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc). Of the ten appellate judges who undertook

a comprehensive study of this subset of pre-*McNally* case law, four concluded that "[it] is only too obvious that there is no settled meaning to the phrase 'the intangible right to honest services' that is capable of providing constitutionally adequate notice." *Id.* at 160 (dissent by Jacobs, J., joined by Walker, C.J., and Cabranes and Parker, JJ.). And the *Rybicki* majority itself, while offering the narrow observation that pre-*McNally* cases involving a private employee's failure to disclose material facts required "perhaps some economic or pecuniary detriment" to the victim, expressly qualified that assertion by acknowledging one "atypical" pre-*McNally* case that held otherwise. *Id.* at 141 n.16.

The confusion becomes overwhelming when the examination of pre-*McNally* cases is expanded beyond the private fraud cases, to which *Rybicki* expressly confined its discussion (354 F.3d at 138-39), to encompass honest services cases against public officials. On the issue specifically flagged in *Rybicki*—whether pecuniary harm must be proven—a number of courts rejected any such requirement. *United States v. Holzer*, 816 F.2d 304, 309-10 (7th Cir. 1987) (rejecting argument that government must show that public official obtained something of value from victims of the fraud); *United States v. Mandel*, 591 F.2d 1347, 1364 n.12 (4th Cir. 1979) (rejecting "construction of the mail fraud statute * * * to the effect that pecuniary or property injury is necessary"). The Eighth Circuit, however, reached the opposite conclusion. *United States v. Rabbitt*, 583 F.2d 1014, 1025-26 (8th Cir. 1978) (overturning conviction of public official in part because there was no pecuniary harm to citizens); *United States v. McNeive*, 536 F.2d 1245, 1252 (8th Cir. 1976) (same).

These and other disagreements among the courts of appeals in pre-*McNally* cases show that any such approach to construing the statute demands a determination of *which* pre-*McNally* case to rely on. The quest thus resembles looking for answers in ambiguous legislative history—a search for statements congenial to one's own predisposition. *See Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005) (comparing judicial investigation of legislative history to an exercise in "looking over a crowd and picking out your friends").

In any given circuit, this problem of selecting which of divergent precedents to rely on is compounded by the institutional preference inherent in the notion of binding circuit precedent. When conflicts between circuits arise, courts would presumably be bound by the pre-*McNally* case law from their own circuits. *See* Pet. App. 12a ("[W]e turn for guidance in construing the statute to our pre-*McNally* case law and any relevant post-*McNally* decisions, and then consider pre- and post-*McNally* decisions from our sister circuits."). As a consequence, if § 1346 actually reinstated all pre-*McNally* law, it would be a "truly extraordinary statute, in which the substantive force of the statute varied in each judicial circuit." *Brumley*, 116 F.3d at 743 (dissent).

In the face of conflicting pre-*McNally* precedent relating to "honest services" fraud, the *Rybicki* dissent sums up the impossibility of simply reinstating pre-*McNally* law:

> [N]o unambiguous meaning can be assigned to a phrase that has no meaning except what can be distilled from some pre-

> *McNally* cases provided that other pre-*McNally* cases are ignored, particularly since the designation of overruled cases that are in and those that are out is itself essentially arbitrary. Ordinary people cannot be expected to undertake such an analysis; rare is the lawyer who could do it; and no two lawyers could be expected to agree independently on the elements of an offense that must be defined by such a project.

Rybicki, 354 F.3d at 160 (dissent).

V. REQUIRING HONEST SERVICES PROSECUTIONS OF STATE OFFICIALS FOR NONDISCLOSURE TO REST ON BREACH OF A PREEXISTING DUTY TO DISCLOSE IN NO WAY IMPEDES THE VIGOROUS PROSECUTION OF FRAUD AND BRIBERY

Interpreting § 1346 in nondisclosure cases like this one as requiring evidence that the defendant breached a disclosure obligation under either state law or under federal law separate and apart from 18 U.S.C. § 1346 would cure the federalism, vagueness, and lenity problems that plague respondent's interpretation. Importantly, such an interpretation would have no detrimental effect on the government's ability to prosecute blatant acts of public corruption, such as bribery.

Requiring a preexisting disclosure duty in order to prosecute nondisclosures of conflicts of interest will have no harmful consequence to the vast majority of public corruption prosecutions. The government can properly prosecute any fraudulent scheme involving the mails so long as the official violated some independent duty that gives rise to the correlative

"right of honest services." *See Rabbitt*, 583 F.2d at 1024 ("The concept of fraud on the public may clearly fall within the ambit of the mail fraud statute *where dishonest conduct by a public official directly implicates the functions and duties of that official's public office.*") (emphasis added). It simply cannot do so in the absence of such a duty, on the ground that a more candid and forthright alternative course of conduct could be imagined. *See United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1999) (finding that government could not prosecute public official for honest services fraud despite "reprehensible" conduct because official did not fail to perform his official duties).

Virtually every state—Alaska is no exception—has detailed ethics guidelines for public officials; "[t]he problem is not a lack of state laws on the subject of government misconduct." Brown, *Should Federalism Shield Corruption?*, 82 CORNELL L. REV. at 275-76. Quid pro quo bribery, for example, is outlawed in the public sector by every state. *See id.* Accordingly, the government can prosecute under § 1346 any state public official who uses the mails to implement a bribery scheme. *See United States v. Dixon*, 536 F.2d 1388, 1400 (2d Cir. 1976) (explaining that public official commits fraud by taking a bribe because "the public official has been paid to act in breach of his duties").

Honest services prosecutions are entirely proper when the government shows—in addition to the other elements of mail fraud—that the defendant failed to perform or misperformed duties that were incumbent

upon him.[11] But they are not proper where, as here, the government alleges that the public official violated some principle of good behavior that is not demonstrably obligatory under some statute, regulation, or another clear duty arising outside of § 1346. This approach prevents the absurd but, under respondent's view, theoretically permissible prosecution of a state legislator for his "decision to vote for a bill because he expects it will curry favor with a small minority essential to his reelection," or the prosecution of a mayor who "use[s] the prestige of his office to obtain a restaurant table without a reservation." *Sorich*, 129 S.Ct. at 1309 (Scalia, J., dissenting).

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[11] As noted above in Part I, there is substantial doubt that the mere violation of an express duty to disclose constitutes fraud, and thus falls within the ambit of § 1341, as expanded by § 1346, absent further proof that the nondisclosure did in fact, or was intended to, facilitate the denial either of property, or the consequential performance of one's job.

CONCLUSION

For the reasons stated above, the Court should reverse the judgment of the court of appeals and remand for further proceedings.

Respectfully submitted,

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RESPONDENT'S BRIEF

144

(8)

No. 08-1196

In the Supreme Court of the United States

BRUCE WEYHRAUCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, to convict a state official for depriving the public of its right to the defendant's honest services through the non-disclosure of material information, in violation of the mail-fraud statute (18 U.S.C. 1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 2
Summary of argument 9
Argument:
A state official's violation of the honest services statute by taking official action while intentionally concealing a material conflict of interest does not depend on proof that the official violated a disclosure duty imposed by state law 13
A. Section 1346's text and legal context establish that state officials may engage in honest-services mail fraud by concealing a material conflict of interest even if state law does not require disclosure of that conflict 14
1. The text of Section 1346 reinstated pre-*McNally* jurisprudence without reference to state law 16
2. Section 1346 reinstated pre-*McNally* jurisprudence that held that honest-services mail fraud does not require a violation of state law 21
3. Congress's reinstatement of pre-*McNally* law that honest-services fraud does not depend on a state-law violation is not undermined by any inconsistency in that body of law 32
B. Section 1346's drafting and legislative history confirm that public-sector honest-services fraud does not depend on an official's violation of state-law obligations 35

Table of Contents—Continued: Page

C. Interpreting Section 1346 to exclude a state-law disclosure requirement does not create a federal common-law crime 40
D. Neither constitutional avoidance, federalism principles, nor the rule of lenity supports a state-law-violation requirement 44
1. The elements of Section 1346 sufficiently define its scope 44
2. Section 1346 satisfies any applicable clear-statement principle animated by federalism concerns 49
3. The rule of lenity does not support implying a state-law-violation requirement into Section 1346 52
Conclusion 53
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Anderson v. *City of Parsons*, 496 P.2d 1333 (Kan. 1972) 27
Anderson v. *Zoning Comm'n*, 253 A.2d 16 (Conn. 1968) 27
Atherton v. *FDIC*, 519 U.S. 213 (1997) 40
Atlantic Sounding Co. v. *Townsend*, 129 S. Ct. 2561 (2009) 15
Badders v. *United States*, 240 U.S. 391 (1916) 50
Boyce Motor Lines, Inc. v. *United States*, 342 U.S. 337 (1952) 47
Bradford v. *United States*, 129 F.2d 274 (5th Cir.), cert. denied, 317 U.S. 683 (1942) 24

Cases—Continued: Page

Cannon v. *University of Chi.*, 441 U.S. 677 (1979) 16
Carter v. *United States*, 217 U.S. 286 (1910) 27
Chiarella v. *United States*, 445 U.S. 222 (1980) 30
Cleveland v. *United States*, 531 U.S. 12 (2000) 5, 14, 18, 19, 22
Colautti v. *Franklin*, 439 U.S. 379 (1979) 47
Corning Glass Works v. *Brennan*, 417 U.S. 188 (1974) 15
Dean v. *United States*, 129 S. Ct. 1849 (2009) 20
Dirks v. *SEC*, 463 U.S. 646 (1983) 30
Durland v. *United States*, 161 U.S. 306 (1896) 46
Evans v. *United States*, 504 U.S. 255 (1992) 21, 51
Exxon Mobil Corp. v. *Allapattah Servs., Inc.*, 545 U.S. 546 (2005) 16
Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 50
Jerome v. *United States*, 318 U.S. 101 (1943) 19
Jersey City v. *Hague*, 115 A.2d 8 (N.J. 1955) 27
Kirby v. *Cruce*, 688 S.W.2d 161 (Tex. App. 1985) 27
Kungys v. *United States*, 485 U.S. 759 (1988) 49
McCormick v. *United States*, 500 U.S. 257 (1991) 51
McDermott Int'l., Inc. v. *Wilander*, 498 U.S. 337 (1991) 15
McNally v. *United States*, 483 U.S. 350 (1987) .... *passim*
Miles v. *Apex Marine Corp.*, 498 U.S. 19 (1990) 15
Mississippi Band of Choctaw Indians v. *Holyfield*, 490 U.S. 30 (1989) 19
Morissette v. *United States*, 342 U.S. 246 (1952) 21
Muscarello v. *United States*, 524 U.S. 125 (1998) 52

Cases—Continued: Page

National Archives & Records Admin. v. *Favish*, 541 U.S. 157 (2004) 16
Neder v. *United States*, 527 U.S. 1 (1999) 34, 40, 48, 49
Parr v. *United States*, 363 U.S. 370 (1960) 50
Russello v. *United States*, 464 U.S. 16 (1983) 20
SEC v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963) 25, 30
Salinas v. *United States*, 522 U.S. 52 (1997) 51
Screws v. *United States*, 325 U.S. 91 (1945) 47
Shushan v. *United States*, 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 574 (1941) 24
Smith v. *City of Albany*, 61 N.Y. 444 (1875) 27
Sorich v. *United States*, 129 S. Ct. 1308 (2009) 45
State ex rel. Attorney Gen. v. *Broadaway*, 93 S.W.2d 1248 (Ark. 1936) 26
Texas Indus., Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981) 40
United States v. *Alexander*, 741 F.2d 962 (7th Cir. 1984) 22, 24
United States v. *Alkins*, 925 F.2d 541 (2d Cir. 1991) 47
United States v. *Antico*, 275 F.3d 245 (3d Cir. 2001), cert. denied, 537 U.S. 821 (2002) 31, 41, 48
United States v. *Barber*, 668 F.2d 778 (4th Cir.), cert. denied 459 U.S. 829 (1982) 26
United States v. *Barrett*, 505 F.2d 1091 (7th Cir. 1974), cert. denied, 421 U.S. 964 (1975) 24
United States v. *Blanton*, 719 F.2d 815 (6th Cir. 1983), cert. denied, 465 U.S. 1099 (1984) 24

Cases—Continued: Page

United States v. *Bloom*, 149 F.3d 649 (7th Cir. 1998) 42
United States v. *Brown*, 540 F.2d 364 (8th Cir. 1976) 26, 29
United States v. *Brumley*, 116 F.3d 728 (5th Cir.), cert. denied, 522 U.S. 1028 (1997) 31, 32, 33, 42, 43
United States v. *Bruno*, 809 F.2d 1097 (5th Cir.), cert. denied, 481 U.S. 1057 (1987) 21, 22, 24
United States v. *Bryan*, 58 F.3d 933 (4th Cir. 1995), overruled on other grounds by *United States* v. *O'Hagan*, 521 U.S. 642 (1997) 30, 42
United States v. *Bush*, 522 F.2d 641 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976) 21, 25, 27, 28, 29, 48
United States v. *Carbo*, 572 F.3d 112 (3d Cir. 2009) .. 41, 42
United States v. *Chestman*, 947 F.2d 551 (2d Cir. 1991), cert. denied, 503 U.S. 1004 (1992) 46
United States v. *deVegter*, 198 F.3d 1324 (11th Cir. 1999), cert. denied, 530 U.S. 1264 (2000) 42
United States v. *Dowling*, 739 F.2d 1445 (9th Cir. 1984), rev'd on other grounds, 473 U.S. 207 (1985) 32
United States v. *Edwards*, 458 F.2d 875 (5th Cir.), cert. denied, 409 U.S. 891 (1972) 29
United States v. *Frost*, 125 F.3d 346 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998) 31, 42
United States v. *Gaudin*, 515 U.S. 506 (1995) 49
United States v. *Gray*, 790 F.2d 1290 (6th Cir. 1986), rev'd *sub nom. McNally* v. *United States*, 483 U.S. 350 (1987) 22, 26
United States v. *Hasner*, 340 F.3d 1261 (11th Cir. 2003), cert. denied, 543 U.S. 810 (2004) 42

Cases—Continued: Page

United States v. *Holzer*, 816 F.2d 304 (7th Cir.), vacated, 484 U.S. 807 (1987) 21, 26, 27, 48, 49
United States v. *Isaacs*, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974) 22, 24
United States v. *Jennings*, 487 F.3d 564 (8th Cir. 2007) 31, 48
United States v. *Keane*, 522 F.2d 534 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976) 25, 28, 29, 48
United States v. *Kemp*, 500 F.3d 257 (3d Cir. 2007), cert. denied, 128 S. Ct. 1329 (2008) 41
United States v. *Kincaid-Chauncey*, 556 F.3d 923 (9th Cir. 2009), petition for cert pending, No. 09-5076 (filed June 29, 2009) 41, 47
United States v. *Lopez-Lukis*, 102 F.3d 1164 (11th Cir. 1997) 31, 41
United States v. *Louderman*, 576 F.2d 1383 (9th Cir.), cert. denied, 439 U.S. 896 (1978) 29
United States v. *Lovett*, 811 F.2d 979 (7th Cir. 1987) 23
United States v. *Mandel*, 591 F.2d 1347 (4th Cir.), vacated, 602 F.2d 653 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980) 21, 23, 26, 28, 29, 38, 39
United States v. *Margiotta*, 688 F.2d 108 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983) 21, 24, 25, 27, 29, 39
United States v. *McGeehan*, No. 05-1954, 2009 WL 3380678 (3d Cir. Oct. 22, 2009) 42
United States v. *McNeive*, 536 F.2d 1245 (8th Cir. 1976) 22, 29, 34
United States v. *Murphy*, 768 F.2d 1518 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986) 22, 24

Cases—Continued: Page

United States v. *O'Hagan*, 521 U.S. 642 (1997) ... 30, 31, 45
United States v. *Panarella*, 277 F.3d 678 (3d Cir.), cert. denied, 537 U.S. 819 (2002) 41, 42
United States v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979) 34
United States v. *Ragen*, 314 U.S. 513 (1942) 47
United States v. *Rauhoff*, 525 F.2d 1170 (7th Cir. 1975) 24
United States v. *Reamer*, 589 F.2d 769 (4th Cir. 1978), cert. denied, 440 U.S. 980 (1979) 48
United States v. *Rybicki*, 354 F.3d 124 (2d Cir. 2003), cert. denied, 543 U.S. 809 (2004) 21, 31, 44
United States v. *Sawyer*:
85 F.3d 713 (1st Cir. 1996) 41, 47
239 F.3d 31 (1st Cir. 2001) 31, 42
United States v. *Scallion*, 533 F.2d 903 (5th Cir. 1976), cert. denied, 429 U.S. 1079 (1977) 29
United States v. *Silvano*, 812 F.2d 754 (1st Cir. 1987) 26, 27
United States v. *Sorich*, 523 F.3d 702 (7th Cir. 2008), cert. denied, 129 S. Ct. 1308 (2009) 31, 42
United States v. *States*, 488 F.2d 761 (8th Cir. 1973), cert. denied, 417 U.S. 909, and 417 U.S. 950 (1974) ... 29
United States v. *Sun-Diamond Growers*, 138 F.3d 961 (D.C. Cir. 1998), aff'd on other grounds, 526 U.S. 398 (1999) 31
United States v. *Urciuoli*, 513 F.3d 290 (1st Cir. 2008) 41

Cases—Continued: Page

United States v. *Vinyard*, 266 F.3d 320 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002) 31
United States v. *Walker*, 490 F.3d 1282 (11th Cir. 2007), cert. denied, 128 S. Ct. 1649 (2008) 41, 48
United States v. *Warner*, 498 F.3d 666 (7th Cir.), cert. denied, 128 S. Ct. 2500 (2008) 47
United States v. *Williams*, 545 F.2d 47 (8th Cir. 1976) 29
United States v. *Woodward*, 149 F.3d 46 (1st Cir. 1998), cert. denied, 525 U.S. 1138 (1999) 41, 48
Village of Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) 49
Virginia v. *Moore*, 128 S. Ct. 1598 (2008) 43
Williams v. *State*, 315 P.2d 981 (Ariz. 1957) 26

Constitution, statutes and regulation:

U.S. Const. Amend. IV 44
Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, 102 Stat. 4181:
§ 4603(2), 102 Stat. 4287 20
§ 6211, 102 Stat. 4359 20
16 U.S.C. 3372(a)(2) 19
16 U.S.C. 3373(d) 19
18 U.S.C. 371 2
18 U.S.C. 666 51
18 U.S.C. 666(a)(1)(B) 2
18 U.S.C. 842(c) 19
18 U.S.C. 924(g)(3) 20
18 U.S.C. 1262 19

Statutes and regulation—Continued: Page

18 U.S.C. 1341 ..... *passim*
18 U.S.C. 1346 ..... *passim*
18 U.S.C. 1951(a) 2
18 U.S.C. 1952(a) 19
18 U.S.C. 1952(b) 19
18 U.S.C. 1955 19
18 U.S.C. 1958 19
18 U.S.C. 1961(1)(A) 19
22 U.S.C. 2714(a) 20
22 U.S.C. 2714(b) 20
22 U.S.C. 2714(e)(6) 20
Alaska Stat. § 24.60.030(e)(3) (2002) 6, 43
Tex. Penal Code Ann. § 36.08(e) (West 1994) 43
17 C.F.R. 240.10b-5 29

Miscellaneous:

Anti-Corruption Act of 1988, S. 2793, 100th Cong., 2d Cong. (1988) 35, 37, 38
133 Cong. Rec. (1987):
p. 22,339 38
p. 32,959 51
p. 32,961 51
134 Cong. Rec. (1988):
pp. 15,045-15,047 37
p. 15,046 ..... 36, 39, 51
p. 30,310 37
p. 30,766 37
pp. 30,766-30,767 37

Miscellaneous—Continued: Page

p. 30,767 ..... 37, 51
p. 30,768 38
p. 30,781 37
p. 30,826 38
p. 30,920 37
p. 30,936 37
pp. 31,071-31,072 37
pp. 31,071-31,073 38
p. 32,639 39
p. 32,678 39
p. 33,150 38
p. 33,250 38
pp. 33,296-33,297 38
p. 33,297 ..... 38, 51
p. 33,318 ..... 38, 39
H.R. 5210, 100th Cong., 2d Cong. (1988) 37, 38, 39
Mail Fraud: Hearing on H.R. 3089 and H.R. 3050 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 100th Cong., 2d Sess. (1988) 35, 36, 37, 39, 51
Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* (1890) 28
William L. Prosser, *Handbook of the Law of Torts* (1955) 30
S. 2531, 100th Cong., 2d Sess. (1988) 36

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 548 F.3d 1237. The order and opinion of the district court (Pet. App. 22a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 2008. The petition for rehearing was denied on January 7, 2009. The petition for a writ of certiorari was filed on March 25, 2009, and was granted on June 29, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutes are reprinted in the appendix. App., *infra*, 1a-2a.

STATEMENT

A grand jury in the District of Alaska charged petitioner with honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346; attempted extortion under color of official right, in violation of 18 U.S.C. 1951(a); bribery concerning programs receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(B); and conspiracy to commit mail and wire fraud, extortion, and bribery, in violation of 18 U.S.C. 371. J.A. 11-37. In a pre-trial order denying the government's motion to admit certain evidence, the district court held that, in order to prove honest-services mail fraud based on a state official's failure to disclose a conflict of interest, the government must establish a "duty [to disclose] imposed by state law." Pet. App. 35a-36a. The court of appeals reversed and remanded, finding no basis for concluding that "Congress intended to condition the meaning of 'honest services' on state law." *Id.* at 16a.

1. In May 2007, a federal grand jury issued an indictment that, *inter alia*, charged petitioner with honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346. J.A. 35-36; see J.A. 11-37 (indictment).

The indictment alleges that, in February 2006, the Governor of Alaska announced an agreement with three oil companies to construct a natural-gas pipeline from Alaska's North Slope. The agreement contemplated that the State would significantly change its taxation of oil production, and it therefore required the Alaska legislature's approval. J.A. 15-16. The agreement proposed a "petroleum production tax" (PPT) under which the oil companies would pay a 20% tax rate based on their net profits and receive a 20% tradeable tax credit. J.A. 16-17. That formula, known as the "20/20" PPT rate, was

much debated throughout the 2006 regular and special sessions of the Alaska State Legislature. *Ibid.*

The construction of the gas pipeline was important to VECO Corp. ("Company A" in the indictment), a multinational company that derived significant income from field-services contracts with oil companies in Alaska. J.A. 14, 16.[1] VECO supported the 20/20 PPT legislation and opposed legislation imposing a higher tax rate. J.A. 17.

Petitioner is a lawyer who, from 2002 until January 2007, was an elected member of the Alaska House of Representatives. J.A. 14. The indictment alleges that, in May 2006, petitioner solicited VECO executives to secure legal work to perform after his retirement from the legislature in exchange for petitioner's support as a legislator for the 20/20 PPT legislation. J.A. 18-19, 23-24, 26-28. The indictment further alleges that in exchange for VECO's promise of future legal work (J.A. 20, 26, 28), petitioner agreed to perform official acts benefitting VECO, including voting in favor of PPT legislative proposals supported by VECO; lobbying other elected officials to support such legislation; assisting in maneuvering the PPT legislation through the House and Senate; and "shoe-horn[ing]" himself into a meeting on legislative counter-proposals and reporting the details to VECO. J.A. 19, 25-26, 29-30.

According to the indictment, petitioner voted for PPT legislation supported by VECO, including amendments to the legislation. J.A. 19, 24. For instance, after voting the "wrong way" on an amendment, petitioner switched his vote based on instructions from VECO. J.A. 24. The next day, petitioner advised VECO's chief

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[1] VECO's identity as "Company A" became public during pretrial litigation. See, *e.g.*, Pet. App. 23a-24a.

executive officer that a higher, 21% tax rate was a "political reality," but petitioner nevertheless would vote for VECO's preferred legislation. J.A. 25-26. Petitioner subsequently tried unsuccessfully to have the legislative session adjourned before a vote on an amendment that VECO opposed. J.A. 28. One day later, petitioner told a VECO executive that the PPT bill was "coming along poorly" and that it was "real frustrating" to petitioner given his efforts to further VECO's interests concerning the legislation. *Ibid.*

The government intends to prove that petitioner took these official actions affecting VECO's interests concerning the PPT legislation without disclosing to the public or the Alaska legislature that he was at the time soliciting employment from VECO. J.A. 39.

2. The honest-services mail fraud count of the indictment alleges that, by the actions described above, petitioner and his co-defendants schemed "to defraud and deprive the State of Alaska of its intangible right to the honest services of * * * [petitioner], performed free from deceit, self-dealing, bias, and concealment." J.A. 35. The indictment further alleges that petitioner mailed to VECO a solicitation of legal employment for the purpose of executing that scheme or artifice to defraud. J.A. 18, 23, 36-37. That charge is based on the mail fraud statute, 18 U.S.C. 1341, which makes it unlawful for any person, "having devised or intending to devise any scheme or artifice to defraud," to use the mail "for the purpose of executing such scheme or artifice or attempting to do so," and on Section 1346, which states that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

Section 1346 responded to *McNally* v. *United States*, 483 U.S. 350 (1987). *McNally* held that Section 1341 precluded a mail fraud prosecution brought on the theory that the citizens of a state "had been deprived of their right to have the [State's] affairs conducted honestly" by a public official who participated in a self-dealing scheme in which he "did not disclose [his] interest" in the official actions taken under that scheme. *Id.* at 352, 355, 361 & n.9. The Court recognized that the government's position was that a public official's "failure to disclose [his] financial interest, even if state law did not require it," constituted a scheme or artifice to defraud under Section 1341. *Id.* at 361 & n.9. The Court also acknowledged that "a line of decisions" from the courts of appeals held that "the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government." *Id.* at 355. But the Court concluded that the text of Section 1341 "does not refer to th[at] intangible right," *id.* at 356, and therefore "read § 1341 as limited in scope to the protection of property rights," *id.* at 360. "If Congress desires to go further," the Court explained, "it must speak more clearly than it has." *Ibid.*

The following year, Congress enacted 18 U.S.C. 1346 to reinstate one of the intangible rights that courts had recognized before *McNally* as a basis for a mail fraud conviction: "the intangible right of honest services." *Cleveland* v. *United States*, 531 U.S. 12, 19-20 (2000).

3. a. In pre-trial proceedings, the government indicated its intent to introduce evidence that petitioner had a duty under state law to disclose that he was soliciting and negotiating employment with VECO at the same time that he was taking official action on the PPT legislation. Pet. App. 23a. It argued that petitioner's failure

to disclose that conflict of interest was relevant to prove, *inter alia*, petitioner's "intent to defraud through the deliberate concealment of his conflict of interest" and his "consciousness of guilt" concerning his use of "public office for [his] personal gain." Gov't Trial Br. 19 (filed Aug. 29, 2007). The government explained that, *inter alia*, Alaska law specifically prohibits legislators from taking official action substantially benefitting or harming those with whom they are negotiating for employment. J.A. 46 (citing Alaska Stat. § 24.60.030(e)(3) (2002)).

Petitioner subsequently filed a motion *in limine*, arguing that no Alaska statute or rule required that he disclose his negotiations with VECO. Petitioner thus asked that the district court preclude the government from admitting evidence regarding state disclosure requirements. J.A. 52-53. The government simultaneously filed a motion seeking leave to introduce into evidence four items relevant to establishing petitioner's "inten[t] to conceal the existence of [his] financial" conflict of interest (J.A. 71): (1) Alaska legislative ethics publications in petitioner's possession that excerpted state statutory conflict-of-interest and disclosure requirements; (2) evidence that Alaska state legislators customarily acknowledge (and the legislative clerk records) conflicts of interest on the floor of the legislature; (3) a description of the legislative ethics training petitioner received; and (4) evidence that petitioner served on the legislature's Select Committee on Ethics, which instructs legislators on their ethical obligations and distributes ethics publications. J.A. 39-41. The government argued that petitioner had a duty to disclose his conflict of interest under both state law and general fiduciary principles, J.A. 41-45, 68, and that honest-services mail fraud may

be proved either on the theory that petitioner (a) "knowingly violated a state law" or (b) "knowingly concealed the existence of a conflict of interest" in violation of his "fiduciary duties to the public of the State of Alaska," J.A. 41, 45-46.

b. The district court denied the government's motion and granted petitioner's request to exclude the evidence. Pet. App. 22a-36a. As relevant here, the court rejected the view that honest-services fraud may be based on a duty to disclose inhering in federal law, and instead held that "any duty to disclose sufficient to support the mail * * * fraud charges here must be a duty imposed by state law." *Id.* at 35a-36a; see *id.* at 31a-36a.

The court recognized that Alaska statutes regulate legislative conflicts of interest by (1) prohibiting legislators from "tak[ing] or withhold[ing] official action or exert[ing] official influence that could substantially benefit or harm the financial interest of another person with whom the legislator is negotiating for employment" and (2) imposing a more general duty to "conduct the public's business in a manner that preserves the integrity of the legislative process and avoids conflicts or even appearances of conflicts of interest." Pet. App. 25a, 28a (citations omitted). In addition to those abstention obligations, the court concluded that Alaska law requires every legislator to obtain the legislature's consent before abstaining from any vote. *Id.* at 27a-28a. But the court concluded that no state-law provision required petitioner to *disclose* his conflict of interest before taking official action on the PPT legislation, *id.* at 29a, and the court reasoned that, because Alaska statutes "supersede the provisions of the common law relating to [a legislator's] conflict of interest," any disclosure "duty

must be found in a statute" for "purposes of Alaska law." *Id.* at 28a (citation omitted).

4. On the government's interlocutory appeal, the court of appeals reversed. Pet. App. 1a-21a. The court held that a state official may be convicted of honest-services mail fraud under 18 U.S.C. 1341 and 1346 without "proof that the conduct at issue also violated an applicable state law." Pet. App. 1a-2a.

The court of appeals explained that, before *McNally*, it had construed the mail fraud statute to reach such schemes "without reference to any underlying state law duty." Pet. App. 15a. It also observed that, under its pre-*McNally* jurisprudence and the decisions of other courts of appeals, "two core categories of conduct by public officials" would support a conviction for honest-services fraud without reference to state law: "(1) taking a bribe or otherwise being paid for a decision while purporting to be exercising independent discretion and (2) nondisclosure of material information." *Id.* at 19a.

Because Congress accepted *McNally*'s invitation to "speak more clearly" by enacting Section 1346 and thereby extended the mail fraud statute to proscribe schemes to deprive citizens of the intangible right to honest services, Pet. App. 11a, the court of appeals reasoned that "Congress demonstrated a clear intent to reinstate the line of pre-*McNally* honest services cases," which "generally did not require state law to create the duty of honesty that public officials owe the public." *Id.* at 17a. "Congress'[s] intent in reinstating the honest services doctrine after *McNally*," the court concluded, was to bring "at least the two core categories of official misconduct" previously recognized "within the reach of § 1346." *Id.* at 20a.

The court of appeals concluded that nothing in "the text or legislative history of § 1346 reveal[s] that Congress intended to condition the meaning of 'honest services' on state law." Pet. App. 16a. Accepting petitioner's state-law restriction, the court explained, would lead to the unusual result that "conduct in one state might violate the mail fraud statute, whereas identical conduct in a neighboring state would not," *ibid.*, even though "Congress has given no indication it intended the criminality of official conduct under federal law to depend on geography." *Id.* at 16a-17a.

The court of appeals explained that its interpretation of Section 1346 did not improperly intrude on state interests. "Congress has a legitimate constitutional basis for preventing public officials from using the mails to perpetrate fraud," the Court observed, and "federal action based on a valid constitutional grant of authority" is legitimate, whether or not "state law prohibits particular conduct." Pet. App. 17a-18a.

Turning to the facts of this case, the court concluded that the indictment's allegations "describe an undisclosed conflict of interest and could also support an inference of a quid pro quo arrangement to vote for the oil tax legislation in exchange for future remuneration in the form of legal work." Pet. App. 20a. Because such alleged misconduct by petitioner "falls comfortably within the two categories long recognized as the core of honest services fraud," the court held that the government could proceed on both theories. *Ibid.*

SUMMARY OF ARGUMENT

The honest-services prohibition in 18 U.S.C. 1346 covers a state official's concealment of a material conflict of interest while taking official action that furthers that undisclosed interest. Proof that the official violated

a disclosure duty imposed by state law is not required. Section 1346's text, context, and history all support that conclusion, and no non-textual canon of construction justifies adding a state-law gloss. An implied state-law-violation requirement is unwarranted and unnecessary, and it would frustrate Congress's paramount interest in uniform application of federal criminal law in an area of critical importance: the protection of citizens against corruption and conflicts of interest among public officials.

A. Section 1346 must be understood in light of *McNally* v. *United States*, 483 U.S. 350 (1987), because Congress's purpose was to reinstate and protect the previously recognized intangible right of honest services that *McNally* rejected. The prosecution in *McNally* posited that a state official's failure to disclose a conflict of interest—"even if state law did not require it"—constituted a deprivation of honest services. *Id.* at 361 n.9. Congress's intent to restore the pre-*McNally* law on honest-services fraud necessarily extended to schemes like the one in *McNally* itself—a scheme that was prosecuted without showing any state-law violation.

The text of Section 1346 confirms that conclusion. Section 1346 states that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Nothing in that language signifies an intent to incorporate state law. Settled principles of construction reinforce that interpretation. Federal law is presumed not to depend on state law, in part because Congress is generally understood to intend its enactments to have uniform national application. When Congress departs from that background principle, it usually expressly refers to state law—as it has in a number of federal criminal laws, in-

cluding ones enacted contemporaneously with Section 1346. Those principles apply with special force here. In response to *McNally*, Congress restored the federal protection against state and local corruption that lower courts had uniformly recognized. Congress had every reason to provide the Nation's citizenry with an equal right to honest services from public officials, rather than supplying a patchwork of federal protection that varied State by State, county by county, town by town, according to local laws enacted for different purposes.

The term "the intangible right of honest services" is a term of art, and its use signals Congress's intention to adopt doctrine from pre-*McNally* decisions. Public-sector prosecutions typically involved two types of crimes: (1) accepting a bribe or kickback in payment for official action, or (2) taking action on an official matter while concealing a material conflict of interest. Of particular significance here, those cases uniformly recognized that an honest-services fraud conviction in the nondisclosure category need not be predicated on a state-law disclosure requirement. Rather, the cases consistently held that public officials had inherent fiduciary duties to act in the public's interest and to make disclosure of conflicting interests, and that taking official action on undisclosed conflicts breached the duty of loyalty and constituted honest-services fraud. Courts interpreting Section 1346 have properly looked to pre-*McNally* law to define the crime, and, consistent with that doctrine, no state-law violation is necessary.

B. The drafting and legislative history reveals that Congress did not intend to base nondisclosure honest-services fraud on violations of state law. Congress considered several post-*McNally* proposals that would have incorporated state law into the definition of a related

intangible-rights offense or made state-law violations a sentencing enhancement. But it rejected those proposals in favor of a simple, unqualified phrase that refers to pre-existing honest-services law, which had rejected any dependence on state law. From the Justice Department's initial proposal forward, proof of the elements of a state offense was not required.

C. The interpretation of Section 1346 without a state-law component does not create a common-law crime. Courts look to pre-*McNally* law to give content to Section 1346, just as they look to the common law to inform the meaning of money-or-property fraud in Section 1341. Interpreting statutory language drafted against a backdrop of prior case law is not the invention of a common-law crime. Applying that approach, courts have identified two core forms of honest-services fraud, each of which involves a breach of the duty of loyalty. These types of frauds can take many forms, but that does not open up new forms of liability that sweep past pre-*McNally* landmarks.

Petitioner's position—that courts should invent and define a state-law requirement that has no precursor in federal fraud law—would itself launch courts on a common-law-style mission of supplying limits that Congress rejected. That step is both unwarranted and unwise: federalizing state rules adopted for different purposes would raise far greater state sovereignty concerns than does the court of appeals' decision.

D. Reading state law into Section 1346 cannot be justified as necessary to avoid a serious constitutional question (of vagueness), to alleviate federalism concerns, or to serve the rule of lenity. Section 1346's elements sufficiently define and narrow the crime to avoid vagueness and lenity concerns. The government must

prove a breach of the duty of loyalty, an intent to deceive, and materiality. A defendant who breaches those settled duties, by accepting bribes or kickbacks or by failing to disclose self-dealing or material conflicts of interest, *and* who intends to deceive the citizenry, has ample notice of his criminal conduct. Concerns about changing the federal-state balance are also misplaced. Congress intentionally sought to restore the federal-state balance before *McNally*—under which federal prosecutions safeguarded the integrity of state and local government, thereby filling an otherwise unmet need. And the rule of lenity has no role to play in this case. Section 1346, properly construed in light of its background, is not ambiguous. Nor does anything in the language, legislative history, or purpose of the statute permit implying a state-law limit that Congress did not enact.

ARGUMENT

A STATE OFFICIAL'S VIOLATION OF THE HONEST SERVICES STATUTE BY TAKING OFFICIAL ACTION WHILE INTENTIONALLY CONCEALING A MATERIAL CONFLICT OF INTEREST DOES NOT DEPEND ON PROOF THAT THE OFFICIAL VIOLATED A DISCLOSURE DUTY IMPOSED BY STATE LAW

In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court rejected the unanimous view of the courts of appeals that the mail fraud statute, 18 U.S.C. 1341, protected against not only schemes to obtain money or property, but also schemes to deprive others of intangible rights, such as the intangible right of honest services. The pre-*McNally* jurisprudence had recognized two core public-sector types of honest-services fraud: schemes involving (1) bribery or kickbacks or (2) the

nondisclosure of a public official's conflict of interest in connection with his official action. The use of the mails in such schemes, the courts of appeals uniformly held, constituted mail fraud regardless whether the defendant official's actions also violated a duty under state law. See *McNally*, 483 U.S. at 377 n.10 (Stevens, J., dissenting). Those decisions reflected a consensus that a public official defrauds the citizenry when he takes official action on a matter in which he has a secret conflict of interest because he has a federal duty, recognized in the mail fraud statute itself, to disclose such a conflict.

The year after *McNally*, Congress amended the law to cover "the intangible right of honest services" (18 U.S.C. 1346) that the lower courts previously had protected under Section 1341. *Cleveland* v. *United States*, 531 U.S. 12, 19-20 (2000). Congress thereby prohibited the core misconduct that the pre-*McNally* decisions had addressed. Section 1346's statutory text, its surrounding legal context, and its drafting and legislative history confirm that honest-services mail fraud may be established by a state official's scheme to take official action on a matter in which he has a material, intentionally concealed conflict of interest, even if its disclosure is not required by state law. Petitioner's contrary view cannot be reconciled with the text, context, history, or purpose of Section 1346.

A. Section 1346's Text And Legal Context Establish That State Officials May Engage In Honest-Services Mail Fraud By Concealing A Material Conflict Of Interest Even If State Law Does Not Require Disclosure Of That Conflict

Congress's legislative response to *McNally* demonstrates that, under Section 1346, a state official's scheme to conceal and act upon a material conflict of interest

need not violate a state-law disclosure duty to constitute mail fraud. *McNally* rejected a prior line of decisions recognizing that a "public official owes a fiduciary duty to the public" and unanimously holding that the mail fraud statute proscribed schemes to defraud citizens of their "intangible rights to honest and impartial government." 483 U.S. at 355, 358; *id.* at 362-364 (Stevens, J., dissenting). Justice Stevens, in dissent, would have recognized those decisions as valid interpretations of the mail fraud statute and would have upheld the convictions in *McNally* for defrauding citizens of the intangible "right to the honest services" of government officials. *Id.* at 362. When Congress enacted Section 1346, it employed language derived directly from *McNally* and the line of authority that *McNally* rejected.

The parties agree that Congress "manifest[ed] a clear intention to reverse *McNally*'s holding" (Pet. Br. 34) by enacting Section 1346 to protect "the intangible right of honest services," 18 U.S.C. 1346. In such circumstances, where Congress "respond[s] directly" to overturn a decision of this Court and "adopts without further elaboration [a] term used in [that decision]," Congress is assumed—in the absence of contrary indication—to have "intended [the statutory term] to have its established meaning." *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991). Particularly "where, as here, the legislative history reveals that Congress incorporated words having a special meaning," its use of such "terms of art" must be understood in light of their pre-existing meaning. *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 201-202 (1974).[2] The application of those

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[2] That principle flows from the presumption that "Congress is aware of existing law when it passes legislation," *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990); see *Atlantic Sounding Co.* v. *Townsend*, 129

principles demonstrates that Congress used "the intangible right of honest services" as a term of art in Section 1346 to capture and reinstate the core of pre-*McNally* law of honest-services mail fraud, including its refusal to require a state-law disclosure duty.

*1. The text of Section 1346 reinstated pre-*McNally *jurisprudence without reference to state law*

a. This Court in *McNally* reversed the mail fraud conviction of a state official (Gray) for using the mails to advance a self-dealing scheme in which he concealed his conflict of interest. The government alleged that Gray, a high-ranking state official possessing authority over Kentucky's workers' compensation insurance, schemed with Hunt, an individual with political connections giving him *de facto* control over the company the State would select as its insurance agent, to obtain a portion of the insurance commissions paid by the insurance companies to the State's agent. *McNally*, 483 U.S. at 352-353, 355. McNally, an aider and abetter, nominally operated a company controlled by Gray and Hunt to which the State's selected insurance agent paid commissions under the scheme. *Id.* at 352-353.

The prosecution proceeded on the theory that the state official's "failure to disclose" his conflict of interest to others in state government—"even if state law did not require it"—deprived the people of Kentucky of the

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S. Ct. 2561, 2573 (2009), and the understanding that the Court's "evaluation of congressional action * * * must take into account its contemporary legal context." *Cannon* v. *University of Chi.*, 441 U.S. 677, 698-699 (1979); see *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 587 (2005) (Ginsburg, J., dissenting) (noting the ordinary assumption that "Congress legislated against a background of law already in place and the historical development of that law") (citing *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 169 (2004)).

"right to have the Commonwealth's affairs conducted honestly." *McNally*, 483 U.S. at 361 n.9; see *id.* at 355 (jury instructions). The court of appeals affirmed Gray's and McNally's convictions based on the recognized principles that public officials "owe[] a fiduciary duty to the public" and that the mail fraud statute prohibits such officials from defrauding citizens of their "intangible rights to honest and impartial government." *Id.* at 355, 358; see *id.* at 362 & n.1, 364 (Stevens, J., dissenting) (explaining that federal courts had "uniformly and consistently" read the statute to protect citizens' "right to the honest services" of government officials).

This Court reversed, concluding that Congress's use of the phrase "scheme or artifice to defraud" in Section 1341 "clearly protects property rights" but "does not refer to the intangible right of the citizenry to good government." *McNally*, 483 U.S. at 356; see *id.* at 356-360. The Court accordingly "read § 1341 as limited in scope to the protection of property rights" and explained that, "[i]f Congress desires to go further, it must speak more clearly than it has." *Id.* at 360.

b. Congress enacted Section 1346 the following year to specify that, as used in the mail fraud and related statutes,

> the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. 1346. That provision restores an "intangible right" that *McNally* declined to recognize. Thus, as this Court explained, "Congress amended the law specifically to cover one of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*:

'the intangible right of honest services.'" *Cleveland*, 531 U.S. at 19-20 (quoting 18 U.S.C. 1346).[3]

Petitioner admits that Congress "manifest[ed] a clear intention to reverse *McNally*'s holding" (Pet. Br. 34), but contends (*id.* at 28) that Section 1346 should apply to a state official's scheme to act on an undisclosed conflict of interest only if he violates a "disclosure duty * * * 'imposed by state law.'" That interpretation, however, would incorrectly ascribe to Congress the intent to accept, rather than overturn, a critical aspect of *McNally*'s holding. The convictions in *McNally* were premised on the theory that the state officials' "failure to disclose their financial interest, *even if state law did not require it*," deprived the State's citizens of their right of honest services. 483 U.S. at 361 n.9 (emphasis added); see *id.* at 377 n.10 (Stevens, J., dissenting) (discussing cases holding that mail fraud statute forbids schemes that do not violate state law). If petitioner were correct that a state-law disclosure duty were necessary to convict petitioner for taking official actions in which he deceptively concealed his conflict of interest, the *McNally* defendants would remain beyond the reach of the mail fraud statute notwithstanding Section 1346.

c. Nothing in Section 1346 supports petitioner's contention. The provision's text does not refer to "state law," let alone suggest an intent to incorporate a state-law violation as an element of mail fraud. In fact, all indications point in the opposite direction.

First, "in the absence of a plain indication to the contrary," this Court normally assumes that Congress does "not mak[e] the application of [a] federal act dependent

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[3] Congress did not attempt to cover "intangible rights" more generally and therefore did not cover other forms of public-corruption schemes, such as licensing fraud. *Cleveland*, 531 U.S at 20 & n.3.

on state law," *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989) (quoting *Jerome* v. *United States*, 318 U.S. 101, 104 (1943)), in part because "federal statutes are generally intended to have uniform nationwide application." *Ibid.* *Jerome* applied that principle to the federal bank-robbery statute, holding that the word "felony" encompassed federal rather than state offenses. 318 U.S. at 104. And in the mail fraud statute's protection of property rights, this Court has similarly indicated that whether a state-law interest "constitutes 'property' or 'rights to property' is a matter of federal law." *Cleveland*, 531 U.S. at 25-26 n.4 (citation omitted). Petitioner identifies no "plain indication" warranting incorporation of state law into the offense defined by Section 1346.

Second, Congress has repeatedly used express text when it intends to depart from this background presumption and define federal offenses—including offenses involving use of the mail—by reference to state law. See, *e.g.*, 18 U.S.C. 1952(a) and (b) (use of mail in connection with offenses "in violation of the laws of the State in which they are committed"); 18 U.S.C. 1958 (use of mail with intent that a murder be committed for payment "in violation of the laws of any State"); *McNally*, 483 U.S. at 377 n.10 (Stevens, J., dissenting) (citing 18 U.S.C. 1952(b)).[4] Congress's failure to use such lan-

[4] See also, *e.g.*, 16 U.S.C. 3372(a)(2), 3373(d) (transporting, selling, or purchasing fish or wildlife obtained "in violation of any law or regulation of any State"); 18 U.S.C. 842(e) (knowing distribution of explosive materials to a person in state where their purchase, possession, or use would be in "violation of any State law"); 18 U.S.C. 1262 (transportation of liquor contrary to "the laws of [the] State"); 18 U.S.C. 1955 (conducting a gambling business in "violation of the law of a State or political subdivision"); 18 U.S.C. 1961(1)(A) (federal racketeering predicates involving offenses chargeable as felonies "under State law").

guage in Section 1346 severely undermines the view that a state-law disclosure duty must exist before an honest-services mail fraud prosecution may be brought against a state official who schemes to take official action while concealing a material conflict of interest.

Indeed, elsewhere in the statute that included Section 1346, Congress expressly defined a federal offense based on the defendant's intent to engage in conduct that "violates [a] state law." Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, § 6211, 102 Stat. 4359 (enacting 18 U.S.C. 924(g)(3)); cf. *id.* § 4603(2), 102 Stat. 4287 (enacting 22 U.S.C. 2714(a), (b) and (e)(6) to mandate the denial or revocation of a passport to individuals who cross an international border while committing a drug offense in "violation of State law"). Where, as here, "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Dean* v. *United States*, 129 S. Ct. 1849, 1854 (2009) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

Those principles of construction are particularly important here because Congress had sound reason to avoid dependence on state law. "Because laws governing official conduct differ from state to state, conditioning mail fraud convictions on state law means that conduct in one state might violate the mail fraud statute, whereas identical conduct in a neighboring state would not." Pet. App. 16a. Federal protection in this area should not vary based solely on the differences in state laws enacted for different purposes.

2. *Section 1346 reinstated pre-*McNally *jurisprudence that held that honest-services mail fraud does not require a violation of state law*

Congress's use of the phrase "the intangible right of honest services," 18 U.S.C. 1346, following *McNally* reinforces the conclusion that an honest-services offense does not depend on duties defined by state law. "The definite article 'the'" in that phrase "suggests that 'intangible right of honest services' had a specific meaning to Congress when it enacted the statute" and reflects that "Congress was recriminalizing mail- and wire-fraud schemes of *that* 'intangible right of honest services,' which had been protected before *McNally*." *United States* v. *Rybicki*, 354 F.3d 124, 137-138 (2d Cir. 2003) (en banc), cert. denied, 543 U.S. 809 (2004); cf. *Evans* v. *United States*, 504 U.S. 255, 259-260 (1992) ("[W]here Congress borrows terms of art" it "adopts the cluster of ideas that were attached to each borrowed word.") (brackets in original) (quoting *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)).

Although many pre-*McNally* cases did not use the precise words "honest services" (Pet. Br. 23 n.5), they employed analogous formulations such as a "betrayal of the public trust," *United States* v. *Holzer*, 816 F.2d 304, 311 (7th Cir.), vacated, 484 U.S. 807 (1987), or variants such as "honest and faithful services," *United States* v. *Bruno*, 809 F.2d 1097, 1105 (5th Cir.), cert. denied, 481 U.S. 1057 (1987); *United States* v. *Margiotta*, 688 F.2d 108, 120 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); *United States* v. *Bush*, 522 F.2d 641, 648 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976), "faithful and honest services," or "loyal and honest services," *United States* v. *Mandel*, 591 F.2d 1347, 1357 (4th Cir. 1979), vacated, 602 F.2d 653 (per curiam) (affirming convictions by

equally divided en banc court), cert. denied, 445 U.S. 961 (1980); *United States* v. *McNeive*, 536 F.2d 1245, 1250 (8th Cir. 1976); *United States* v. *Isaacs*, 493 F.2d 1124, 1150 (7th Cir.), cert. denied, 417 U.S. 976 (1974). Other cases simply invoked the public's "right to the honest services of its public officials," *Bruno*, 809 F.2d at 1105; see *United States* v. *Murphy*, 768 F.2d 1518, 1530 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986). The Sixth Circuit in *McNally* itself remarked that cases had addressed "scheme[s] to defraud the citizenry and government of an intangible right, such as honest service." *United States* v. *Gray*, 790 F.2d 1290, 1294 (1986) (quoting *United States* v. *Alexander*, 741 F.2d 962, 964 (7th Cir. 1984)), rev'd *sub nom. McNally*, *supra*. Congress chose the phrase "honest services" to capture the teachings of these cases.

Justice Stevens in his *McNally* dissent specifically labeled that well-settled body of precedent as protecting the public's right to the "honest services" of government officials, 483 U.S. at 362-363 & n.1 (Stevens, J., dissenting). Congress logically incorporated that terminology in its effort to overrule *McNally*. And this Court has subsequently used "honest services" as a term of art, explaining that Congress enacted Section 1346 "specifically" to reinstate "the intangible right of honest services" that "lower courts had protected under § 1341 prior to *McNally*." *Cleveland*, 531 U.S. at 19-20.

Petitioner would consult dictionaries to define "right," "honest," and "services" as separate terms in Section 1346 (Pet. Br. 26-28), without addressing the words in context or analyzing the core pre-*McNally* honest-services jurisprudence that *McNally* rejected and Congress sought to reinstate. Those prior decisions, like the text of Section 1346, did not require proof

of a state official's violation of state law to support a conviction for honest-services mail fraud.

a. Before *McNally*, the lower courts consistently read the first clause of the mail fraud statute—which prohibits using the mail in furtherance of "any scheme or artifice to defraud," 18 U.S.C. 1341—to include schemes designed to deprive the citizenry of its intangible right to have public officials perform their duties honestly. See *McNally*, 483 U.S. at 358. Those public corruption honest-services cases typically involved the prosecution of state or local officials who committed two types of crimes: (1) accepting a bribe or kickback in exchange for official action or (2) taking action within the scope of official duties to further his undisclosed personal interest—with the same course of conduct sometimes implicating both types of fraud.

Mandel involves a typical honest-services case based on bribery. Maryland's governor was convicted under Section 1341 for use of the mail in a scheme in which he aided passage of racetrack legislation in exchange for undisclosed financial and other benefits from several racetrack owners. *Mandel* explains that "the fraud involved in the bribery of a public official lies in the fact that," while "outwardly purporting to be exercising independent judgment in passing on official matters, the official has been paid for his decisions." 591 F.2d at 1362. In such cases, the "public is not receiving what it expects and is entitled to, the public official's honest and faithful service." *Ibid.* Other pre-*McNally* decisions upheld mail fraud prosecutions of similar acts of public corruption. See, *e.g.*, *United States* v. *Lovett*, 811 F.2d 979, 981-982, 985-986 (7th Cir. 1987) (lobbyist bribed mayor to ensure his client received cable franchise);

Isaacs, 493 F.2d at 1149-1150 (governor accepted bribes to influence regulation of horse racing).[5]

Kickbacks, like bribes, involve an official's acquisition of a monetary payment or other item of value from an entity or person who desires official action, usually in the context of a transaction with the government that provides the source of funds to be kicked back. For instance, in *Margiotta*, a *de facto* government official who controlled local decisions contrived the appointment of an insurance broker who selected companies to insure local-government properties. The defendant arranged the broker's appointment on the understanding that the broker would kick back to the defendant's designees a portion of the future brokerage fees that the broker would receive under the arrangement. See 688 F.2d at 113-115, 127-130.[6]

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[5] See also, *e.g.*, *Bruno*, 809 F.2d at 1104-1106 (official in sheriff's office and prison guard schemed to bribe judge assigned to prisoner's case); *Murphy*, 768 F.2d at 1524-1530 (state judge accepted bribes to fix the outcomes of cases); *Alexander*, 741 F.2d at 963-965 (county assessor's deputies accepted bribes to reduce tax assessments); *United States* v. *Rauhoff*, 525 F.2d 1170, 1171, 1175-1176 (7th Cir. 1975) (bribery of Secretary of State to procure contracts for production of license plates); *Bradford* v. *United States*, 129 F.2d 274, 275-277 (5th Cir.) (city councilman bribed by auto dealer to urge city to buy dealer's buses), cert. denied, 317 U.S. 683 (1942).

[6] See also, *e.g.*, *United States* v. *Blanton*, 719 F.2d 815, 816-818 (6th Cir. 1983) (governor arranged for friends to receive state liquor licenses in exchange for a share of the profits), cert. denied, 465 U.S. 1099 (1984); *United States* v. *Barrett*, 505 F.2d 1091, 1103-1105 (7th Cir. 1974) (county clerk received portion of insurance broker's commissions from insurance policies clerk was responsible for obtaining), cert. denied, 421 U.S. 964 (1975); *Shushan* v. *United States*, 117 F.2d 110, 114-115 (5th Cir.) (member of public levee board, who secretly would receive a portion of fees paid under a proposed bond-refund plan, voted

Failures to disclose a conflict of interest concerning official action also constituted a recognized form of honest-services fraud before *McNally*. When an official takes action in such circumstances, he purports to act as a loyal, disinterested public servant, but deprives the public of its right to determine for itself whether he is operating in the public's best interest. The crux of the violation in such a case is the official's deliberate concealment from the citizenry of matters that might reasonably be thought to corrupt the official's decisions. Cf. *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 196 & n.50 (1963) (fiduciary's duty to disclose conflicts of interest serves to reveal whether he is "serving two masters or only one") (internal quotation marks and citation omitted).

The pre-*McNally* cases held that a public official operates under a conflict of interest, and has an attendant disclosure duty, when he, an associate, or person from whom he receives or expects to receive things of value will benefit from or be harmed by his official actions.[7] Many of these cases recognized that such conflicts arise where the official has a personal financial interest that would be affected by his official action. See, *e.g.*, *Bush*, 522 F.2d at 647-648, 651-652 (city public-relations director used official position to influence the award of advertising contract to his company without disclosing his interest); *United States* v. *Keane*, 522 F.2d 534, 538, 546 (7th Cir. 1975) (city councilman voted on

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on and lobbied colleagues to approve that plan), cert. denied, 313 U.S. 574 (1941).

[7] Financial interests such as kickbacks can thus trigger a duty of disclosure. Kickbacks may be analyzed either as similar to bribes or as involving a fiduciary's breach of "a duty to disclose material information or give notice of his conflict of interest." *Margiotta*, 688 F.2d at 128.

matters directly affecting value of properties in which he had non-public ownership interest without disclosing that interest), cert. denied, 424 U.S. 976 (1976). Other cases involved conflicts resulting from the official's financial relationship with other persons whether or not official action was promised as a quid pro quo. See, *e.g.*, *Holzer*, 816 F.2d at 307-309 (judge failed to disclose that he received loans from lawyers with cases before him); *United States* v. *Brown*, 540 F.2d 364, 374-375 (8th Cir. 1976) (city building commissioner failed to disclose that contractors whose bids he acted upon paid his girlfriend's rent at his request).[8]

The fraud found in those bribery/kickback and nondisclosure-of-conflict cases accords with the longstanding common law principle that a public official owes an inherent "fiduciary duty" to the public. See *McNally*, 483 U.S. at 355; *id.* at 372 (Stevens, J., dissenting). As the Sixth Circuit explained in *McNally*, the decisions "are premised on an underlying theory that a public official acts as 'trustee for the citizens and the State . . . and thus owes [them] the normal fiduciary duties of a trustee, *e.g.*, honesty and loyalty.'" *Gray*, 790 F.2d at 1294 (quoting *Mandel*, 591 F.2d at 1363).[9]

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[8] See also *United States* v. *Barber*, 668 F.2d 778, 784-785 & n.4 (4th Cir.) (Alcoholic Beverage Control Commissioner concealed from the public that he was obtaining free liquor for himself and others from liquor companies), cert. denied, 459 U.S. 829 (1982). Cf. *United States* v. *Silvano*, 812 F.2d 754, 759-760 (1st Cir. 1987) (city budget director failed to disclose that he arranged for his friend to receive lucrative city projects).

[9] State courts similarly recognized the fiduciary duty owed by public officials to the citizenry and the State. See, *e.g.*, *Williams* v. *State*, 315 P.2d 981, 983 (Ariz. 1957) ("The relationship between a state official and the state is that of principal and agent and trustee and [trust beneficiary]."); *State ex rel. Attorney Gen.* v. *Broadaway*, 93 S.W.2d 1248,

Courts further reasoned that an "affirmative duty to disclose material information arises out of [that] fiduciary relationship" and an official's breach of that duty while taking official action in the face of a conflict constitutes fraud that deprives the public of its right to the official's honest and faithful services. *United States* v. *Silvano*, 812 F.2d 754, 759 (1st Cir. 1987); see, *e.g.*, *Holzer*, 816 F.2d at 307 ("A public official is a fiduciary toward the public * * * and if he deliberately conceals material information from them he is guilty of fraud."); *Margiotta*, 688 F.2d at 127-128 (defendant who "undert[akes] basic functions of government" has a "duty to disclose material information or give notice of his conflict of interest"); *Bush*, 522 F.2d at 651-652.[10]

1253 (Ark. 1936) ("It is * * * elementary that a public officer occupies a fiduciary position."); *Anderson* v. *Zoning Comm'n*, 253 A.2d 16, 19 (Conn. 1968) ("A public official owes an undivided duty to the public" and "is not permitted to place himself in a position which would subject him to conflicting duties or expose him to the temptation of acting in any manner other than in the best interest of the public."); *Anderson* v. *City of Parsons*, 496 P.2d 1333, 1337 (Kan. 1972) (recognizing "the common law principle that a public officer owes an undivided duty to the public whom he serves and is not permitted to place himself in a position that will subject him to conflicting duties or cause him to act other than for the best interests of the public."); *Jersey City* v. *Hague*, 115 A.2d 8, 11 (N.J. 1955) (Public officials "stand in a fiduciary relationship to the people whom they * * * serve." (citation omitted)); *Smith* v. *City of Albany*, 61 N.Y. 444, 445 (1875) (Council member owes duty of loyalty that prohibits arrangements "by which his individual interest could come in conflict with the interests of his constituents."); *Kirby* v. *Cruce*, 688 S.W.2d 161, 170 (Tex. App. 1985) ("There can be no dispute that public officers * * * are fiduciaries to the public.").

[10] Those holdings again accorded with longstanding common-law descriptions of fiduciaries' obligations. *See Carter* v. *United States*, 217 U.S. 286, 306 (1910) (A public official is forbidden from "retain[ing] any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent" and, "[i]f he takes any

b. Significantly for this case, the courts of appeals that addressed the question before *McNally* "uniformly" recognized that a mail fraud conviction need not be predicated on a violation of state law. *Mandel*, 591 F.2d at 1361; see *McNally*, 483 U.S. at 355 (citing *Mandel* as illustrative of courts of appeals' honest-services jurisprudence); *id.* at 377 n.10 (Stevens, J., dissenting) (citing *Mandel* and other decisions holding that mail-fraud statute forbids schemes that do not violate state law). Although courts permitted the use of state and local provisions governing official conduct as evidence that could tend to prove or disprove the defendant's intent to engage in a deceptive scheme, *e.g.*, *Bush*, 522 F.2d at 653; *Keane*, 522 F.2d at 555, 557; they concluded that a violation of state law was not needed to establish honest-services fraud. *E.g.*, *Bush*, 522 F.2d at 646 n.6, 651-652; *Keane*, 522 F.2d at 544-545.

Some courts reasoned that no external codification of the official's duty to provide honest services (including the duty to disclose material information) is necessary because that duty is inherent in the official's fiduciary relationship with the citizenry: A disclosure duty need not be based upon a particular provision "prescribing such a duty" because it may "exist because of the relationship between the one possessing the material infor-

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* * * benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust."); Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 839, at 562 (1890) (discussing the "universal" rule for "principals and agents, both public and private, that the agent shall not be permitted, in the course of the execution of his agency, to put himself in such a position that his own interests shall be antagonistic to those of his principal" and that "[p]ublic policy therefore demands and the law declares, that, except with the full knowledge and consent of his principal, the agent shall not in the execution of his trust deal with or for himself.").

mation and another, for example, employer-employee; public official-public body." *Mandel*, 591 F.2d at 1363 (citing cases); see *Margiotta*, 688 F.2d at 124 (duty to disclose material information arises from a fiduciary relationship, not local law, under the court's interpretation of "the elements of a mail fraud violation"); *Brown*, 540 F.2d at 374-375 & n.7 (duty to disclose arises from official's duty of loyalty and not state-law obligation); *Bush*, 522 F.2d at 646 n.6, 652 (same). Other pre-*McNally* decisions emphasized that the "purpose of 18 U.S.C. § 1341 is to prevent the Postal Service from being used to carry out fraudulent schemes" and reasoned that this federal interest may cause a scheme to fall within the statute's prohibition "regardless of whether it happens to be forbidden by state law." *United States* v. *States*, 488 F.2d 761, 767 (8th Cir. 1973), cert. denied, 417 U.S. 909, and 417 U.S. 950 (1974); accord *McNeive*, 536 F.2d at 1247 n.2; *Keane*, 522 F.2d at 544-545; *United States* v. *Edwards*, 458 F.2d 875, 880 (5th Cir.), cert. denied, 409 U.S. 891 (1972).[11]

c. The reasoning of pre-*McNally* courts mirrors the Court's rationale in securities-fraud decisions, which interpret regulatory language that parallels the mail fraud statute.[12] Those decisions recognize that the touchstone

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[11] Cf. *United States* v. *Louderman*, 576 F.2d 1383, 1387 (9th Cir.) (concluding that, in case that did not concern honest services fraud, "state law is irrelevant in determining whether a certain course of conduct is violative of the wire fraud statute"), cert. denied, 439 U.S. 896 (1978); *United States* v. *Williams*, 545 F.2d 47, 50 (8th Cir. 1976) (same); *United States* v. *Scallion*, 533 F.2d 903, 910 (5th Cir. 1976) (same), cert. denied, 429 U.S. 1079 (1977).

[12] Rule 10b-5 makes it unlawful to employ any "device, scheme, or artifice to defraud" or to engage in a practice that operates or would operate "as a fraud or deceit upon any person" in connection with the purchase or sale of any security. 17 C.F.R. 240.10b-5.

of "fraud" is "deception," *United States* v. *O'Hagan*, 521 U.S. 642, 653-654 (1997), and conclude that an individual "who fails to disclose material information" can commit fraud through his silence if he has "a duty to [disclose]" that information. *Chiarella* v. *United States*, 445 U.S. 222, 228 & n.9, 232, 235 (1980). A fiduciary has a duty to disclose his own conflicting interest, and if he instead "feign[s] fidelity" to the principal, he has engaged in "deception through nondisclosure." *O'Hagan*, 521 U.S. at 653-655.

The Court's cases, much like pre-*McNally* jurisprudence, also teach that a duty to disclose may arise when the individual has "a fiduciary or other similar relation-[ship] of trust and confidence." *Chiarella*, 445 U.S. at 228 (citation omitted); see *O'Hagan*, 521 U.S. at 652; *Dirks* v. *SEC*, 463 U.S. 646, 654 (1983); cf. *Capital Gains Research Bureau, Inc.*, 375 U.S. at 194 & n.44 ("Courts have imposed on a fiduciary an affirmative duty of 'utmost good faith and full and fair disclosure of all material facts.'") (quoting William L. Prosser, *Handbook of the Law of Torts* 534-535 (1955) (citing cases)). Although "the common law in *some* jurisdictions" imposed a similar obligation in the securities-trading context, this Court recognized (again, like pre-*McNally* courts) a broader, federal disclosure duty derived from the applicable federal statute and its purposes, see *Dirks*, 463 U.S. at 653 & n.10 (emphasis added), notwithstanding the "absence of statutory language or legislative history specifically addressing" that duty. *Chiarella*, 445 U.S. at 230.

d. The courts of appeals have uniformly recognized Congress's intention to reinstate pre-*McNally* doctrine in Section 1346. See, *e.g.*, *United States* v. *Bryan*, 58 F.3d 933, 940 n.1, 942 (4th Cir. 1995) (Section 1346

"clear[ly] indicat[es]" that "Congress was content with the pre *McNally* interpretations of the mail fraud statute," including those finding no requirement of a state-law violation), overruled on other grounds by *O'Hagan*, 521 U.S. at 650.[13] When Congress enacted Section 1346 to overturn *McNally*, its action was intended to revitalize the pre-existing doctrine in the courts of appeals, which had consistently rejected the contention that a violation of an underlying state-law obligation was necessary to violate the mail fraud statute in public-sector honest-services cases.

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[13] See also, *e.g.*, Pet. App. 17a ("Congress demonstrated a clear intent to reinstate the line of pre-*McNally* honest services cases."); *United States* v. *Sorich*, 523 F.3d 702, 707 (7th Cir. 2008) (similar), cert. denied, 129 S. Ct. 1308 (2009); *United States* v. *Jennings*, 487 F.3d 564, 577 n.9 (8th Cir. 2007) (similar); *Rybicki*, 354 F.3d at 136-138 (Courts must interpret Section 1346 by "look[ing] to the case law * * * that *McNally* overruled"); *United States* v. *Antico*, 275 F.3d 245, 261 n.16 (3d Cir. 2001) (Congress restored mail fraud to its "pre-*McNally* status."), cert. denied, 537 U.S. 821 (2002); *United States* v. *Sun-Diamond Growers*, 138 F.3d 961, 973 n.13 (D.C. Cir. 1998) (Congress intended "to revive pre-*McNally* caselaw, at least with respect to the deprivation of honest services."), aff'd on other grounds, 526 U.S. 398 (1999); *United States* v. *Frost*, 125 F.3d 346, 364 (6th Cir. 1997) (Section 1346 "restore[s] the mail fraud statute to its pre-*McNally* scope, according to previous opinions interpreting the intangible right to honest services."), cert. denied, 525 U.S. 810 (1998); *United States* v. *Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (using "pre-*McNally* cases as persuasive authority in evaluating the scope of honest services" because Section 1346 was intended to "overrule *McNally* and reinstate prior law"); accord *United States* v. *Vinyard*, 266 F.3d 320, 326 n.4 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002); *United States* v. *Sawyer*, 239 F.3d 31, 39 (1st Cir. 2001); cf. *United States* v. *Brumley*, 116 F.3d 728, 733 (5th Cir.) (en banc) (acknowledging Congress's restorative purpose, but recognizing that, given that the doctrine "was not a unified set of rules," "Congress could not have intended to bless each and every pre-*McNally* lower court 'honest services' opinion"), cert. denied, 522 U.S. 1028 (1997).

3. *Congress's reinstatement of pre-*McNally *law that honest-services fraud does not depend on a state-law violation is not undermined by any inconsistency in that body of law*

Petitioner's contention (Pet. Br. 47–50) that Congress could not have sought to reinstate "all" pre-*McNally* honest-services jurisprudence provides no support for his view that a state-law violation is a prerequisite in this case. Congress could not have intended to restore every single pre-*McNally* decision because, in some contexts, the lower courts had announced conflicting rules and had failed to clarify the doctrine's scope. But Section 1346 covers what had emerged before *McNally* as the paradigm cases of deceptive breaches of loyalty in both the public and the private sectors, on which the courts had reached general consensus. That consensus, as explained, embodied the understanding that an official's duty to disclose conflicts of interests derived from federal law and did not depend on state-law prescriptions.

The relevant pre-*McNally* case law was not "fractured and inconsistent" as petitioner contends. Pet. Br. 46, 47-50. The Fifth Circuit's decision in *United States* v. *Brumley*, 116 F.3d 728, 733-734 (en banc), cert. denied, 522 U.S. 1028 (1997), incorrectly identifies "uncertaint[y]" over whether a defendant's duties must derive from state law. The one pre-*McNally* case *Brumley* cites as supporting a state-law-violation requirement in fact accepts that a disclosure obligation arises from a "public official's fiduciary duty to the citizenry," *United States* v. *Dowling*, 739 F.2d 1445, 1449 (9th Cir. 1984), rev'd on other grounds, 473 U.S. 207 (1985), making it consistent with the holding of pre-*McNally* courts generally that an honest-services fraud conviction need not

be based on a violation of a separate state-law duty. See pp. 27-29, *supra*. Moreover, the cases that *Brumley* cites—*Holzer*, *Silvano*, *Lovett*, *Bruno*, *Barber*, *Bradford*, and *Shushan*—to illustrate its more general view that the meaning of "honest services" was "uneven" before *McNally*, see 116 F.3d at 733, do not support that view: They present factual scenerios that fall comfortably into the core bribery/kickback and undisclosed-conflict categories of honest-services cases. See pp. 24-26, *supra*.[14]

Petitioner's suggestion (Pet. Br. 48) that the courts of appeals were divided on "whether pecuniary harm must be proven" in public-sector honest-services cases is even farther afield. No such requirement is at issue in this case. And a requirement of pecuniary harm would conflict with the central purpose of the honest-services provision: to permit conviction in bribery/kickback and undisclosed-conflict cases even when the defendant does not deprive the victim of money or property. Schemes to deprive another of honest services are prohibited because they corrupt governmental functions and undermine political accountability, not because they necessarily harm the public fisc. A pecuniary-harm requirement would render Section 1346 largely, if not entirely, redundant of the mail fraud statute as construed in *McNally*—and thus negate Congress's effort to reverse the effect of that decision.

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[14] Petitioner quotes a law-review article and the dissent in *Rybicki* to support his claim that pre-*McNally* cases do not provide a uniform understanding of honest-services fraud. Pet. Br. 47-48. The article, however, cites only to *Brumley*, and petitioner acknowledges that the *Rybicki* dissent is limited to the question of a pecuniary harm requirement in private-sector cases. *Ibid.*

In any event, no pre-*McNally* conflict existed on the subject of pecuniary harm in public-sector cases. Petitioner acknowledges (Pet. Br. 48) that several circuits rejected any such requirement, but incorrectly attributes the opposite rule to the Eighth Circuit based on its decisions in *McNeive*, 536 F.2d at 1252, and *United States* v. *Rabbitt*, 583 F.2d 1014, 1024-1026 (1978), cert. denied, 439 U.S. 1116 (1979). Both cases overturned convictions and both noted that the alleged schemes did not involve monetary harm to the public, but neither rested its holding on the view that such harm must be proved.[15] Thus neither disrupts the pre-*McNally* consensus that a public official's bribe-taking or undisclosed conflict may be actionable regardless of whether it results in pecuniary harm. Cf. *Neder* v. *United States*, 527 U.S. 1, 25 (1999) (pecuniary loss is not an element of mail fraud).

Petitioner therefore provides no reason to turn from the uniform pre-*McNally* law on honest-services fraud. Rather, all indications support the conclusion that Congress intended to revitalize the pre-*McNally* understanding of honest-services fraud in the courts of ap-

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[15] *McNeive* held that the passive acceptance of small tips for ministerial, non-discretionary official acts exercised with no favoritism and without concealment did not establish an "intent to defraud" or a scheme to defraud. 536 F.2d at 1246, 1251-1252. *Rabbitt* found insufficient evidence of fraud when a legislator received a commission for recommending an architecture firm as "competent" to other officials who awarded building projects because the legislator had no authority over the contracts, which were awarded on merit after a formal selection process untainted by impropriety. 583 F.2d at 1020 & n.4, 1024-1026 & n.20. The court reasoned that the defendant's actions involved matters "outside his official duties" that did not implicate a "duty to disclose his interest" or deprive the public of his honest services as a legislator. *Id.* at 1024-1026 & n.20.

peals: no state-law duty of disclosure (and no pecuniary loss) was needed in order to convict a public official for deceptive nondisclosure of a material conflict of interest in a matter on which he took official action.

B. Section 1346's Drafting And Legislative History Confirm That Public-Sector Honest-Services Fraud Does Not Depend On An Official's Violation Of State-Law Obligations

The drafting and legislative history of Section 1346 confirm that the statute draws its meaning from pre-*McNally* honest-services decisions, which rejected the view that a state official who schemes to act upon a concealed conflict of interest must violate a disclosure duty imposed by state law. The history reflects that Congress developed honest-services proposals expressly utilizing state law as a sentencing factor and incorporating state law as an element of a related offense, but ultimately chose text for Section 1346 that does not require that the government prove a violation of state law to establish honest-services mail fraud. Petitioner concludes that the relevant legislative history is of "little use" (Pet. Br. 47) only by overlooking substantial portions of it and failing to acknowledge Congress's drafting decision to omit "state law" requirements from Section 1346. See Pet. Br. 44-47. The full history demonstrates the disconnect between petitioner's position and the statute Congress enacted.

1. Although several legislative proposals were introduced in the wake of *McNally*, Section 1346 grew out of the Anti-Corruption Act of 1988, S. 2793, 100th Cong., 2d Cong. (1988), which itself evolved from text proposed by the Department of Justice during "hearings on legislation to overturn * * * *McNally*." See *Mail Fraud: Hearing on H.R. 3089 and H.R. 3050 Before the Sub-*

comm. on Criminal Justice of the House Comm. on the Judiciary, 100th Cong., 2d Sess. 1, 7 (1988) (*Hearing*) (statement of Chairman Conyers) (explaining that *McNally* eliminated the "intangible rights doctrine, which is based on the theory" that corrupt public officials violate "fiduciary duties" of "honesty and loyalty"). The Department proposed two parallel provisions (18 U.S.C. 225(a) and (d)) targeting schemes to "deprive or defraud [the public] of the honest services" of state and federal public officials, *Hearing* 23, 25 (proposed text), and used "the core phrase * * * 'scheme or artifice to defraud'" to incorporate "the substantial body of case law developed prior to *McNally*," *id.* at 10, 29. Like Section 1346, the text defining those offenses did not refer to state law, and the Department made clear that "proof of the elements of a State offense would not be required" under either honest-services provision. *Id.* at 32-33; accord 134 Cong. Rec. 15,046 (1988) (statement of Sen. McConnell) (same regarding S. 2531, 100th Cong. 2d Sess. (1988)).[16]

The Department's proposal, however, expressly incorporated "state law" in two other ways. It authorized longer sentences for honest-services mail fraud intended to "facilitate an offense under the laws of * * * a State." *Hearing* 23, 25 (Section 225(a) and (d)). And it proposed a separate mail fraud provision targeting schemes to corrupt the "election process" through schemes concerning ballots or voter-registration forms

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[16] Consistent with pre-*McNally* decisions recognizing the evidentiary role played by state and local proscriptions (pp. 28-29, *supra*), the Department explained that "[s]tate and local law would continue to provide guidance as to what constitutes 'honest services' to which inhabitants of these jurisdictions are entitled." *Hearing* 32.

that, *inter alia*, were "illegal under the laws of the State." *Hearing* 23-24 (Section 225(b)).

2. After Senator McConnell introduced S. 2531 based on the Department's proposal, the bill evolved into the Biden-McConnell Anti-Corruption Act of 1988, S. 2793. See 134 Cong. Rec. at 15,045-15,047, 30,766-30,767 (Sens. Thurmond and McConnell). That bill retained without material change the Department's public-sector honest-services and election-based mail fraud provisions (Section 225) and added a new provision (18 U.S.C. 1346) to expand the existing mail fraud statute to private-sector honest-services frauds. 134 Cong. Rec. at 30,936, 31,071-31,072. Under S. 2793, Section 1346 defined the term "scheme or artifice to defraud" in Section 1341 to include "a scheme or artifice to deprive an organization of the intangible right of honest services," but was expressly limited to schemes seeking "anything of value" or intending "loss or harm to the organization." *Ibid.*

On October 14, 1988, the Senate incorporated S. 2793 into the pending Omnibus Anti-Substance Abuse Act of 1988, H.R. 5210, 100th Cong., 2d Sess. See 134 Cong. Rec. at 30,310, 30,766, 30,781, 30,920, 30,936 (Amendment 3699, Item 16). The amendment's sponsors explained that the honest-services provisions were intended to "reverse the McNally decision and allow Federal prosecutors to bring the kinds of public corruption charges that they were able to bring before 1987" and therefore should "be read in the context of" and "in conjunction with pre-McNally case law interpreting the phrase 'scheme or artifice to defraud' in the mail and wire fraud statutes." *Id.* at 30,766 (Sen. Biden) (citing *Mandel*, *Keane*, *Bush*, *Isaacs*, *Brown*, and *States* as illustrative pre-*McNally* decisions); see *id.* at 30,767 (Sen.

DeConcini) (bill "reject[s]" *McNally*); *id.* at 30,768 (Sen. Simon) (bill "restores the law to much the way it was prior to McNally"); cf. 133 Cong. Rec. 22,339 (1987) (Rep. Conyers) (citing, *inter alia*, *Mandel*, *Keane*, and *Silvano*). The Senate passed H.R. 5210, as amended, and transmitted it to the House. 134 Cong. Rec. at 30,826.[17]

3. The House amended the Senate's separate honest-services provisions by consolidating them into Section 1346; eliminating the text that limited Section 1346 to schemes seeking anything of value or intending loss or harm; and deleting the Senate's sentencing enhancement and election-process provisions. The House thus amended Section 1346 into its final form by eliminating all references to state law. See 134 Cong. Rec. at 33,150, 33,250, 33,318.

Representative Conyers, who presided at the hearing at which the Department of Justice first offered its honest-services bill, confirmed that Section 1346 was intended "to overturn the McNally decision" and "restore[] the mail fraud provision" to its pre-*McNally* status, when "every Federal appellate court that had considered [its] scope" had held that it "protect[s] the right of the public to the honest services of public officials." 134 Cong. Rec. at 33,296-33,297 (citing *Mandel* and *Margiotta* as illustrative); cf. *id.* at 33,297 (discussing private-sector decisions). His statement (*ibid.*) specifically cited the pages in *Mandel*, 591 F.2d at 1358-1364, recognizing the "uniformly" held view that an honest-services scheme to defraud (including schemes based on the nondisclosure of material information) is not de-

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[17] The Senate subsequently passed S. 2793 as a free-standing bill, 134 Cong. Rec. at 31,071-31,073, but the House took no action on that bill.

pendent upon a state-law violation. *Id.* at 1361.[18] The House passed H.R. 5210 as the Anti-Drug Abuse Act of 1988, 134 Cong. Rec. at 33,318, and returned the bill to the Senate.

On October 21, 1998, the Senate agreed to the House language without further amendment. 134 Cong. Rec. at 32,678. Senator McConnell described the honest-services provision in Section 1346 as "restor[ing] much that had been lost in the McNally decision" by providing the federal government with the "authority needed to go after vote-buyers, corrupt officials, and white-collar criminals" under the mail fraud statute. *Id.* at 32,639.

In short, Congress chose not to make convictions for honest-services fraud dependent on state law. Although the legislative provisions from which Section 1346 evolved included textual references to state law for two other purposes, the core prohibition on honest-services fraud, from the Department of Justice's initial legislative proposal onward, never did. And "the federal interest in consistent coverage of the prohibited conduct" nationwide ultimately resulted in an honest-services provision that did not in any way turn on "the elements of a State offense." *Hearing* 32; accord 134 Cong. Rec. at 15,046 (Sen. McConnell) ("proof of the elements of a State offense would not be required") (S. 2531).

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[18] Petitioner contends (Pet. Br. 45-46) that Representative Conyers' statements have "no bearing" on the issue at hand. That is incorrect. In citing *Mandel* and *Margiotta*, Representative Conyers called attention to two of the leading pre-*McNally* honest services cases, both of which expressed the consensus view that a state official's duty to disclose a conflict of interest was a core fiduciary obligation he owed to the citizenry. See *Margiotta*, 688 F.2d at 121-122, 124; *Mandel*, 591 F.2d at 1363-1365.

C. Interpreting Section 1346 To Exclude A State-Law Disclosure Requirement Does Not Create A Federal Common-Law Crime

1. Petitioner contends that the court of appeals' conclusion that Section 1346 imposes a disclosure duty on state and local officials improperly creates a federal common-law crime. Pet. Br. 39-40. That contention lacks merit. Courts develop federal common law when they create a "rule of decision that amounts, not simply to an interpretation of a federal statute * * * but, rather, to the judicial 'creation' of a special federal rule of decision." *Atherton* v. *FDIC*, 519 U.S. 213, 218 (1997). See generally *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-643 (1981). In contrast, the court of appeals here *interpreted* Section 1346 in light of its text and history as incorporating the core honest-services doctrine that existed before *McNally*. Just as courts look to prior decisional law to give content to the statutory term "fraud" in Section 1341 because (absent contrary textual clues) Congress is deemed to intend that term to have the "well-settled meaning" of "fraud" at common law, *Neder*, 527 U.S. at 22-23, so too may courts turn to pre-*McNally* cases to give effect to *Congress's* decision to base "the intangible right of honest services" on that jurisprudence. To do otherwise and read a previously unknown state-law predicate into Section 1346 would contravene the text, history, and purpose of that provision.

2. The courts of appeals have overwhelmingly followed the interpretative course that the court of appeals took here. Those courts have interpreted Section 1346's reference to schemes to deprive another of the "right to honest services" as covering the two core categories of official misconduct recognized in pre-*McNally* honest-

services precedent: (1) taking a bribe or kickback for a decision while purporting to exercise independent discretion, and (2) failing to disclose a material conflict of interest in a matter on which the official takes official discretionary action. See Pet. App. 19a.[19] Thus, when an official secretly takes private payment for official action (*e.g.*, by accepting a bribe), he has deprived the public of his honest services within the meaning of Section 1346. *United States* v. *Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997). Likewise, "[w]hen an official fails to disclose a personal interest in a matter over which she has decision-making power, the public is deprived of its right either to disinterested decisionmaking itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act." *United States* v. *Woodward*, 149 F.3d 46, 62 (1st Cir. 1998) (quoting *United States* v. *Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996)), cert. denied, 525 U.S. 1138 (1999).

Consistent with the pre-*McNally* consensus, a majority of the courts of appeals, like the court here, also hold that honest-services fraud need not be based on a "state law violation." See *United States* v. *Walker*, 490 F.3d 1282, 1299 (11th Cir. 2007) (explaining that duty to disclose arises from a relationship of trust independent from a state statute or regulation), cert. denied, 128

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[19] Accord *United States* v. *Carbo*, 572 F.3d 112, 115-116 (3d Cir. 2009); *United States* v. *Kincaid-Chauncey*, 556 F.3d 923, 942-943 (9th Cir. 2009), petition for cert. pending, No. 09-5076 (filed June 29, 2009); *United States* v. *Urciuoli*, 513 F.3d 290, 295 n.3 (1st Cir. 2008); *United States* v. *Kemp*, 500 F.3d 257, 279 (3d Cir. 2007), cert. denied, 128 S. Ct. 1329 (2008); *United States* v. *Panarella*, 277 F.3d 678, 690 (3d Cir.), cert. denied, 537 U.S. 819 (2002); *Antico*, 275 F.3d at 262-263; *United States* v. *Woodward*, 149 F.3d 46, 54 (1st Cir. 1998), cert. denied, 525 U.S. 1138 (1999); *Lopez-Lukis*, 102 F.3d at 1169; *United States* v. *Sawyer*, 85 F.3d 713, 724-725 (1st Cir. 1996).

S. Ct. 1649 (2008); accord *United States* v. *Sorich*, 523 F.3d 702, 712 (7th Cir. 2008), cert. denied, 129 S. Ct. 1308 (2009); *United States* v. *Hasner*, 340 F.3d 1261, 1269 (11th Cir. 2003), cert. denied, 543 U.S. 810 (2004); *United States* v. *Sawyer*, 239 F.3d 31, 41-42 (1st Cir. 2001); *United States* v. *deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) (private-sector honest-services fraud), cert. denied, 530 U.S. 1264 (2000); *United States* v. *Bloom*, 149 F.3d 649, 654 (7th Cir. 1998); *United States* v. *Frost*, 125 F.3d 346, 366 (6th Cir. 1997) ("Federal law governs the existence of fiduciary duty under the mail fraud statute."), cert. denied, 525 U.S. 810 (1998); *Bryan*, 58 F.3d at 940 & n.1. The Fifth Circuit's decision in *Brumley* is the single outlier.[20]

3. It is petitioner's own proposal to incorporate a state-law duty that would require federal courts to make interpretative decisions in what might be described as a common-law fashion. Because the statute's text provides no guidance, courts would have to decide what

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[20] *Brumley* stated that Section 1346 requires proof that a state official charged with honest-services fraud violated a duty "rooted in state law," 116 F.3d at 735, and concluded that Brumley, a state official who adjudicated workers' compensation claims, violated a state criminal statute by soliciting and accepting a large amount of money from a lawyer who appeared before him while simultaneously ruling on the lawyer's cases and "us[ing] his position * * * to assist [the lawyer's] dealings with the agency." *Id.* at 731, 734-736. The Third Circuit has cited *Brumley* approvingly in the course of affirming honest-services convictions where the defendants also violated state criminal law, but has reserved the question of whether a state-law violation is necessary under Section 1346. See *Panarella*, 277 F.3d at 698-699 & n.9; see also *United States* v. *McGeehan*, No. 05-1954, 2009 WL 3380678, at *6 & n.6 (3d Cir. Oct. 22, 2009) (noting court's reservation of whether a statutorily created state-law duty is necessary in each case and observing that the court has been "equivocal" on that point); *Carbo*, 572 F.3d at 115, 117 n.4.

sources of state law would qualify to impose duties: Would the law have to be a criminal law? See, *e.g.*, *Brumley*, 116 F.3d at 733-734 (finding state criminal law sufficient, but leaving open whether it was necessary). If so, would a misdemeanor, rather than a felony, suffice? Or could the "law" be found in administrative regulations, common-law decisions, or even ethics pamphlets? Courts would also have to decide whether a disclosure duty must be spelled out in state law, or whether it could instead be implied from an affirmative prohibition. Notably, *Brumley* itself did not involve a state disclosure provision but instead rested on a prohibition against certain conduct creating a conflict of interest. See *id.* at 735-736 (finding that Brumley violated a Texas criminal law, Tex. Penal Code Ann. § 36.08(e) (West 1994)), making it a misdemeanor for an official with judicial authority to accept a benefit from a person interested in a matter before the official or his tribunal).[21]

In addition to those difficulties, federalizing state-law duties would intensify the very concerns about state sovereignty that petitioner unjustifiably raises in opposition to the court of appeals' decision. See Pet. Br. 30-34; see also pp. 49-51, *infra*. The court of appeals' approach supplies a uniform federal rule, grounded in longstanding fiduciary principles, that neither builds upon nor displaces state laws or codes of ethics. In contrast, petitioner's approach would attach to a set of state-law duties federal consequences that the States did not contemplate and may not desire. Cf. *Virginia* v.

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[21] The government contends that petitioner similarly violated Alaska law prohibiting his official action on a matter that could substantially benefit or harm a entity with which he was negotiating for employment. See Alaska Stat. § 24.60.030(e)(3) (2002); p. 7, *supra*.

Moore, 128 S. Ct. 1598, 1606 (2008) (reading of Fourth Amendment to incorporate state search standards "would often frustrate rather than further state policy"). Making state law an ingredient of mail fraud would fragment federal criminal law in a way harmful to federal policy interests, but would do nothing to promote—and indeed might undermine—the independent interests of the States.

D. Neither Constitutional Avoidance, Federalism Principles, Nor The Rule Of Lenity Supports A State-Law-Violation Requirement

Petitioner contends that three interpretive principles support his contention that this Court should superimpose on Section 1346 the requirement of proving a state-law disclosure duty. In petitioner's view (Pet. Br. 29-39), constitutional avoidance (to avoid vagueness concerns), principles of federalism, and the rule of lenity justify that result. Section 1346, however, is limited in ways that sufficiently clarify its scope and narrow its application. Claims of vagueness, federalism, and lenity are misplaced.

1. The elements of Section 1346 sufficiently define its scope

Honest-services fraud contains three basic non-jurisdictional elements: (a) a breach of the duty of loyalty; (2) intent to deceive; and (c) materiality.

Duty of Loyalty. Schemes to deprive others of "the intangible right of honest services" require that a public official, agent, or someone who owes a comparable duty of loyalty breaches that duty by secretly acting in his own interests while purporting to act in the interests of his principal. See *Rybicki*, 354 F.3d at 141-142. Such

feigned loyalty to one's principal (here, the public) is a classic form of fraud. See *O'Hagan*, 521 U.S. at 653-654.

McNally itself exemplifies the equation of "honest services" with the duty of loyalty, see 483 U.S. at 355; it involved a breach of loyalty based on the nondisclosure of a personal financial interest that might reasonably be thought to influence official decisionmaking, "even if state law did not require [disclosure]," *id.* at 361 n.9. Other pre-*McNally* cases similarly illustrate the two general categories involving breaches of this duty: cases involving bribes or kickbacks and cases involving official action taken while operating under an undisclosed conflict of interest. See pp. 23-26, *supra*. Section 1346 therefore does not target all manner of dishonesty but rather criminalizes only schemes in which an employee or public officer takes official action to further his own interests while pretending to act in the interests of those to whom he owes a duty of loyalty.

Limiting actionable honest-services schemes in that manner ensures that Section 1346 does not "render[] criminal a state legislator's decision to vote for a bill because he expects it will curry favor with a small minority essential to his reelection"; cover "a mayor's attempt to use the prestige of his office to obtain a restaurant table without a reservation"; or reach "a public employee's recommendation of his incompetent friend for a public contract." *Sorich* v. *United States*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari). Honest-services fraud does not embrace allegations that purely political interests may have influenced a public official's performance of his duty. The core interests that give rise to the divided loyalties covered are personal financial interests of the official, his family, or his associates that raise a conflict with official

duties. See p. 26 & n.8, *supra*. Nor does honest-services fraud embrace an official's use of the "prestige" of his position or his recommendation of an incompetent friend for a contract. An official's duty of loyalty, and his duty to disclose, concern only matters within his exercise of official power and authority, not actions outside of those spheres.

In honest-services prosecutions involving the non-disclosure of material conflicts, courts can identify the types of conflicts that implicate a federal duty by consulting the extensive case law on the issue while recognizing that the paradigmatic case arises from the presence of personal financial interests. Whatever line drawing may be involved in defining the precise scope of the disclosure obligation, no difficult questions arise when, as is alleged in this case, an official takes action affecting a company with whom he is negotiating for future employment. And courts may resolve the harder questions at the outer boundaries of the offense in much the same way they do in other, similar areas of law. Courts, for example, must determine the kinds of relationships covered by the securities law's prohibition against misappropriation of information in violation of a fiduciary "or similar" relationship. See *United States* v. *Chestman*, 947 F.2d 551, 567-568 (2d Cir. 1991) (en banc) (finding family relationship covered), cert. denied, 503 U.S. 1004 (1992). In this context, as in others, judicial decisions regarding the scope of fiduciary duties have never been thought to raise insurmountable vagueness problems.

Intent to Deceive. The mail and wire fraud statutes punish only "scheme[s] or artifice[s]" to "defraud," thus limiting their scope to intentional, fraudulent conduct. See *Durland* v. *United States*, 161 U.S. 306, 313 (1896).

The government therefore bears the burden of proving beyond a reasonable doubt fraudulent intent—that is, an intent to deceive. See, *e.g.*, *United States* v. *Warner*, 498 F.3d 666, 691 (7th Cir. 2007), cert. denied, 128 S. Ct. 2500 (2008); *United States* v. *Alkins*, 925 F.2d 541, 549-550 (2d Cir. 1991). False representations, statements, or omissions unaccompanied by a subjective intent to deceive do not amount to fraud. See *United States* v. *Kincaid-Chauncey*, 556 F.3d 923, 946 (9th Cir. 2009) (nondisclosure must be coupled with intent to defraud), petition for cert. pending, No. 09-5076 (filed June 29, 2009); *Sawyer*, 85 F.3d at 732 & n.16 ("prior to *McNally*, courts endorsing the honest-services mail fraud theory invariably required some showing of deceit which is inherent in the term 'fraud'"); *id.* at 733 (even bribery requires intent to deceive in order to constitute honest-services fraud).

This Court has recognized that a specific intent requirement goes far towards eliminating constitutional concerns of the kind petitioner raises about vagueness and lack of fair warning. *Colautti* v. *Franklin*, 439 U.S. 379, 395 & n.13 (1979); *Screws* v. *United States*, 325 U.S. 91, 101-102 (1945) (plurality opinion). Because "statutes must deal with untold and unforeseen variations in factual situations," this Court demands "no more than a reasonable degree of certainty" and has long recognized that the "presence of culpable intent as a necessary element of the offense" significantly undermines vagueness concerns. *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340, 342 (1952). Simply put, a "mind intent upon willful evasion is inconsistent with surprised innocence." *United States* v. *Ragen*, 314 U.S. 513, 524 (1942).

In light of the requirement of intent to deceive, Section 1346 does not cover a public official who fails to disclose a conflict of interest because he believes that he has no such conflict. Nor does it cover an official whose interest is public knowledge or whose official actions are undertaken without deceptive intent. State law may be relevant in this context: if an employee complies with state-law disclosure obligations and does not take other acts reflecting an intent to conceal a conflict, those facts will inform the factfinder's evaluation of his intent.

That evidentiary role of state law is not unusual. Both courts and juries are familiar with giving an official's compliance or noncompliance with state law (including state disclosure and reporting requirements) a supporting evidentiary role in assessing whether he intended to deceive. See, *e.g.*, *United States* v. *Jennings*, 487 F.3d 564, 578-580 (8th Cir. 2007); *United States* v. *Antico*, 275 F.3d 245, 265 (3d Cir. 2001) (defendant's failure to report his conflict of interest under state and local conflict-of-interest laws is relevant to prove intent to deceive), cert. denied, 537 U.S. 821 (2002); *Bush*, 522 F.2d at 653 (jury may consider evidence of defendant's filing "correct verified written statement of economic interest * * * in deciding whether or not defendant acted in good faith"); accord *Walker*, 490 F.3d at 1299; *Holzer*, 816 F.2d at 309; *Keane*, 522 F.2d at 553-557; *Woodward*, 149 F.3d at 62; cf. *United States* v. *Reamer*, 589 F.2d 769, 770-771 (4th Cir. 1978) (jury properly instructed that evidence of lawyer's violation of professional ethics was relevant to defendant's intent), cert. denied, 440 U.S. 980 (1979).

Materiality. Because materiality is an element of the mail fraud offense, *Neder*, 527 U.S. at 25, insignificant misrepresentations or omissions are not actionable.

In the present context, a legislator's nondisclosed conflict must make a difference to the way reasonable voters or fellow office holders assess whether he has placed his self-interest above that of the public. Although compliance with state law can be relevant in determining whether the undisclosed conflict is sufficiently serious to count as material under the mail fraud statute, materiality is ultimately a question for the factfinder to resolve on the evidentiary record. *United States* v. *Gaudin*, 515 U.S. 506, 511, 522-523 (1995). The evidence, including evidence of state-law requirements, will guide the jury's determination of whether the official's omission is a material one that has "a natural tendency to influence, or be capable of influencing, the decision of the decision-making body." *Id.* at 509 (quoting *Kungys* v. *United States*, 485 U.S. 759, 770 (1988)) (brackets omitted); see *Neder*, 527 U.S. at 22 n.5; see also, *e.g.*, *Holzer*, 816 F.2d at 307-308 ("objective" "standard of materiality" governs official's disclosure obligation).

In combination, those elements define a core crime of honest-services fraud that requires no additional nontextual elements to alleviate vagueness issues. Especially since "[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand," *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7 (1982) (citation omitted), any lingering concerns about doubtful applications should be addressed on particular facts, not by judicial amendment of the statute.

2. Section 1346 satisfies any applicable clear-statement principle animated by federalism concerns

Petitioner claims that Section 1346 alters the traditional federal-state balance without the requisite clear

statement because the statute "dramatically expand[s]" the authority of the federal government to prosecute state officials for corruption. Pet. Br. 30; see *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-461 (1991). That view is unfounded. Congress may prohibit the use of the mail system "in furtherance of a scheme that it regards as contrary to public policy," regardless whether it could proscribe the scheme in the absence of this federal connection. *Parr* v. *United States*, 363 U.S. 370, 389 (1960) (quoting *Badders* v. *United States*, 240 U.S. 391, 393 (1916)). And in enacting Section 1346, Congress did no more than reaffirm the federal-state balance in this area that had existed for decades before *McNally*. That extensive pre-*McNally* law obviated the need for federal courts, in petitioner's words, to "develop from scratch" new disclosure duties for state officials, Pet. Br. 30. See *McNally*, 483 U.S. at 362-363 & n.1, 365 (Stevens, J., dissenting) (noting uniform interpretation of statute to cover prosecution of state and local public officials; collecting cases). Congress incorporated in Section 1346 a defined body of law that over the course of many years had contributed to shaping federal-state relations.

Moreover, in reviving this law, Congress manifested its view that local corruption is a matter of significant federal interest. In discussions about the honest-services provisions of Section 1346, lawmakers specifically stressed the "overriding federal interest" (Pet. Br. 34) in combating state and local corruption, and they noted that state law and prosecuting authorities were not always equal to the task. Senator DeConcini explained that federal honest-services prosecutions were "a valuable tool in combating corruption in Government" because state prosecutions are "frequently insufficient to combat [such] corruption" in light of "the sophistica-

tion" and "interstate nature of many of these crimes." 134 Cong. Rec. at 30,767; see *id.* at 15,046 (Sen. McConnell) (discussing shortcomings of state public-corruption prosecutions); cf. *id.* at 33,297 (Rep. Conyers) (Congress has authority to enact legislation targeting "corruption in local government"); 133 Cong. Rec. at 32,959, 32,961 (Rep. Conyers) (Congress has a "duty to act" against such corruption). Department of Justice officials similarly explained that "a federal solution" was required to eradicate state and local corruption "inimical to maintaining public trust and confidence in our democracy." See *Hearing* 15-17, 30-31, 38 (explaining that state prosecutors usually welcome federal mail fraud prosecutions for public corruption; such officials often lack the resources, investigative tools, or requisite geographic jurisdiction to bring such cases); *id.* at 59 (former official noting "overwhelming consensus" among state prosecutors that federal prosecutions were "not an unwarranted intrusion on local prerogatives"). Those statements reflect the compelling federal interests that motivated Congress, after *McNally* halted honest-services prosecutions of state and local public officials, to reinstate the federal criminal prohibition.[22]

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[22] Congress's assertion of federal authority over state and local corruption in other statutes further underscores its recognition of the federal interest in such matters. See, *e.g.*, *McCormick* v. *United States*, 500 U.S. 257 (1991) (Hobbs Act prohibits state legislator's receipt of political contributions in exchange for promise to perform official act.); *Evans*, 504 U.S. 255 (same for local commissioner's receipt of non-campaign contributions); cf. *Salinas* v. *United States*, 522 U.S. 52 (1997) (bribery of sheriff need not have demonstrated effect on federal funds for bribery prosecution under 18 U.S.C. 666).

3. The rule of lenity does not support implying a state-law-violation requirement into Section 1346

Petitioner also errs in arguing (Pet. Br. 37-39) that the rule of lenity supports importing a state-law predicate into Section 1346. The rule of lenity applies only if there is a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted).

Properly construed in light of its background, Section 1346's scope is not ambiguous (and certainly not "grievous[ly]" so). And nothing in the statutory language, purpose, or drafting history leaves room for a supposedly clarifying addition that would tie an honest-services prosecution to a violation of state law. The misconduct that deprives the public of its right to undivided loyalties from elected and appointed officials has long been understood as a federal crime. To import state law into a statute designed to provide a uniform and distinct level of federal protection runs counter to Congress's decision to revive pre-*McNally* law—a body of law that gave notice to public officials that deceptive breaches of the settled duty of loyalty warranted federal criminal punishment without a requirement of a state-law violation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 1341 of Title 18, United States Code, provides in pertinent part:

Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. * * * *

2. Section 1346 of Title 18, United States Code, provides:

Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

REPLY BRIEF

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No. 08-1196

IN THE

Supreme Court of the United States

BRUCE WEYHRAUCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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16 37

TABLE OF CONTENTS

Page

Table of Authorities iv

Reply 1

I. The Government's Brief Obscures The Fact That It Can Only Prevail If Honest Services Fraud May Be Predicated On Nothing More Than An Omission To Disclose Information, Where There Is No Legal Disclosure Duty Apart From § 1346 3

II. Assuming It Is Possible To Prove Honest Services Fraud Simply By Showing An Omission To Disclose And No Other Deprivation Of A Right Or Duty, At Least The Disclosure Duty Must Be Proven To Exist Apart From § 1346 6

A. The government's construction of the statute is wrong for all the reasons advanced in petitioner's opening brief 6

B. The government's analysis in support of its extreme construction of the statute is unsound on its face 8

1. Rather than interpret the words of the statute, the government proclaims "the right of honest services" to be a term of art that simply reincorporates the pre-*McNally* case law 9

2. The government's reliance on context and purpose, legislative history, and alleged canons of construction is equally unpersuasive 11

TABLE OF CONTENTS

(continued)

Page

3. The meaning of "honest services" that the government conjures up from the pre-*McNally* cases—as imposing a federal fiduciary duty of loyalty to be defined by federal courts—offers no guidance in determining generally applicable rules of disclosure for public officials 13

C. The government's claimed right to prove honest services fraud based solely on a breach of a disclosure duty found only in § 1346 is contradicted by its own repeated statements and by its overview of the pre-*McNally* case law 18

1. The government both briefly affirms and expressly rejects its alternative theory that honest services fraud is committed by an official who continues in office while failing to disclose a conflict of interest, but does not misuse his authority in response to it 18

2. The government's extensive citation of pre-*McNally* case law is inapposite, because the cases nearly all involve bribery, kickbacks, and self-dealing, where concealment was simply part of the fraud scheme and not, as here, the only honest service alleged to be denied ... 22

TABLE OF CONTENTS

(continued)

Page

III. The Court Should Reject The Government's List Of "Three Basic Non-Jurisdictional Elements" Of Honest Services Fraud, Which Would Eliminate The Need To Prove Fraud As That Word Is Generally Understood 26

Conclusion 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Barber v. Gonzales,
347 U.S. 637 (1954) 9

Black v. United States,
No. 08-876 (U.S. petition granted May 18, 2009) 1

De Sylva v. Ballentine,
351 U.S. 570 (1956) 12

Engine Manufacturers Ass'n v. South Coast Air Quality Management District, 541 U.S. 246 (2004) 9

International Union of Electrical, Radio & Machine Workers, Local 790 v. Robbins & Myers, Inc., 429 U.S. 229 (1976) 10

Kamen v. Kemper Financial Services, Inc.,
500 U.S. 90 (1991) 8, 12

McNally v. United States,
483 U.S. 350 (1987) ..... *passim*

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) 12

Neder v. United States,
527 U.S. 1 (1999) 3

Pfizer, Inc. v. Government of India,
434 U.S. 308 (1978) 10

SEC v. Chenery Corp.,
318 U.S. 80 (1943) 14

Skilling v. United States,
No. 08-1394 (U.S. petition granted Oct. 13, 2009) 1

TABLE OF AUTHORITIES

(continued)

Page

United States v. Bush,
522 F.2d 641 (7th Cir. 1975) 26

United States v. DeVegter,
198 F.3d 1324 (11th Cir. 1999) 15

United States v. Dixon,
536 F.2d 1388 (2d Cir. 1976) 24

United States v. Holzer,
816 F.2d 304 (7th Cir.), *vacated on other grounds by* 484 U.S. 807 (1987) 15, 25

United States v. Margiotta,
688 F.2d 108 (2d Cir. 1982) 13, 25

United States v. Rabbitt,
583 F.2d 1014 (8th Cir. 1978) 24

United States v. Rybicki,
354 F.3d 124 (2d Cir. 2003) (en banc) 21, 23

United States v. Silvano,
812 F.2d 754 (1st Cir. 1987) 26

United States v. Trans-Missouri Freight Ass'n,
166 U.S. 290 (1897) 10

STATE CASES

Anderson v. City of Parsons,
496 P.2d 1333 (Kan. 1972) 15

Burton Township v. Speck,
144 N.W.2d 347 (Mich. 1966) 15

Commonwealth v. Howard,
379 S.W.2d 475 (Ky. 1964) 11

Miller v. Porter,
47 Ky. (8 B. Mon.) 282 (1847) 11

TABLE OF AUTHORITIES

(continued)

Page

Pressey v. Township of Hillsborough, 117 A.2d 646 (N.J. Super. Ct. App. Div. 1955) 15

State ex rel. Cook v. Seneca County Board of Commissioners, 889 N.E.2d 153 (Ohio Ct. App. 2008) 15

FEDERAL STATUTES

18 U.S.C. § 1346 ..... *passim*

STATE CONSTITUTIONS AND STATUTES

ALASKA STAT. § 24.60.020 (2007) 15

KY. CONST. § 173 11

KY. REV. STAT. ANN. § 11A.020(1)(c) (2009; effective 1992) 11

KY. REV. STAT. ANN. § 45A.455(2) (2009; effective 1980) 11

OTHER AUTHORITIES

1 BOUVIER'S LAW DICTIONARY (1897) 27

William C. Anderson, A DICTIONARY OF LAW (1893) 27

George Gleason Bogert, HANDBOOK OF THE LAW OF TRUSTS (1921) 13

John C. Coffee, Jr., *Modern Mail Fraud*, 35 AM. CRIM. L. REV. 427 (1998) 15

Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795 (1983) 13

REPLY

Section 1346 was enacted in 1988 to reverse the holding of *McNally v. United States*, 483 U.S. 350 (1987), which limited the coverage of the federal fraud statutes to schemes aimed at wrongfully depriving another of money or property. Section 1346 thus made explicit that those statutes extend to fraud schemes aimed at "depriv[ing] another of the intangible right of honest services."

At issue in this case, and the other two cases on which this Court has granted review,[1] is the outer boundary of those "right[s] of honest services" that may constitute the ultimate object of a prosecutable fraud scheme. Certainly, when the government alleges misperformance of public responsibilities as the thing denied by the fraudulent conduct, it must show that the defendant's performance was inconsistent with some legal duty or entitlement. Failing that, the "service[]" rendered by the official must be regarded as legally proper and no one has been defrauded of anything.

The parties appear to agree on that much. But they disagree on the sources of law that the government can draw upon to show that some actual "right of honest services" was denied by fraudulent conduct. Petitioner submits, as the trial court held, that the "honest service" denied—the duty whose breach is the ultimate wrong at issue—must rest on some established principle of law that exists separate

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[1] *See Black v. United States*, No. 08-876 (U.S. petition granted May 18, 2009); *Skilling v. United States*, No. 08-1394 (U.S. petition granted Oct. 13, 2009).

from the reference in § 1346 to a right of honest services.

The government asserts, to the contrary, that a fraudulent denial of honest services can be established simply by proving the nondisclosure of a perceived conflict of interest, which act may violate a state official's federal fiduciary duty of disclosure found in the phrase, "right of honest services," even though it violates no disclosure duty found anywhere else in state or federal law.

Petitioner submits that the government's theory should be rejected as unsound because it simply criminalizes the act of nondisclosure and eliminates the need to prove any effort to deny anything *by fraud*. *See* infra, section III.

But even if a failure to disclose information can, standing alone, be a fraudulent denial of honest services, it must rest on an actual state or federal disclosure requirement. *There is no issue in this case whether that legal duty to disclose must arise as a matter of state as distinguished from federal law.*[2] It simply cannot be found in the penumbra of the undefined concept of "honest services."

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[2] The question presented, which asks whether "the government must prove that the defendant violated a disclosure duty imposed by state law," is accurate within the context of this case only because the district court found—and the government never disputed—that no relevant federal law disclosure duty, separate and apart from § 1346, required disclosure under the circumstances here. Pet. App. 30a.

I. The Government's Brief Obscures The Fact That It Can Only Prevail If Honest Services Fraud May Be Predicated On Nothing More Than An Omission To Disclose Information, Where There Is No Legal Disclosure Duty Apart From § 1346

In resolving the issue before the Court—whether the alleged nondisclosure by petitioner can be prosecuted as a denial of honest services without showing that it violated some provision of law independent of § 1346—it is critically important that the government is relying on the omission to disclose as the only honest service denied, the ultimate object of the alleged fraud.

In proving any ordinary case of fraud, including mail fraud, the prosecutor routinely offers evidence of material misrepresentations or omissions that are part of the fraudulent means by which the defendant allegedly pursued the object of his fraud, whether it be the deprivation of money, property or some intangible legal right. *See, e.g., Neder v. United States*, 527 U.S. 1, 16 (1999). No showing of some other violation of law is required to support admission of such evidence. Much of the government's brief, and most of its discussion of the pre-*McNally* case law, Gov. Br. ("GB") 23-31, is devoted to establishing this proposition, with which petitioner has no disagreement.

In this case, however, the explicit premise of the rulings below was the government's request to prove its case under what the district court referred to as an "alternative theory of the crime" to the quid pro quo bribery theory alleged in the indictment. Pet. App. 30a. Specifically, the rulings below were made in direct response to the government's motion to be allowed to prove its honest services case *without*

showing any improper conduct except for the failure to disclose.

Because the government's brief blurs the line between their quid pro quo theory, the validity of which has never been challenged, *see* Pet. App. 36a, and this alternative, pure nondisclosure theory, it bears emphasizing why the procedural history limits this Court's review to the latter. The indictment principally alleged that petitioner violated § 1346 by performing official acts benefiting VECO "in exchange for VECO's promise of future legal work." GB 3 (citing J.A. 20, 26, 28). Petitioner offered no legal objection to this prototypical quid pro quo fraud theory.

The indictment's sketchy and unspecific allegations against petitioner, however, reveal a lack of evidence to support the quid pro quo theory.[3] Perhaps for that reason, twelve days before trial, the government by motion in limine sought leave, as well to proceed under an "alternative" theory (Pet. App. 30a)—that that petitioner violated § 1346 simply by failing to "'disclos[e] to the Alaska State Legislature the fact that he had solicited, and was in fact negotiating for, employment from' VECO," and doing nothing else. J.A. 56.

The government motion explained that, through its alternative theory, it would show "a knowing concealment of a conflict of interest by [petitioner], as

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[3] Compare J.A. 23-31, with the allegations against co-defendant Kott. *See* J.A. 20-23 (co-defendant stating, "You'll get your gasline, the governor gets his bill, and I'll get my job in Barbados.")

well as evidence demonstrating a violation of Alaska state law by [petitioner], in connection with [petitioner's] solicitation and negotiation of employment with [VECO]." J.A. 39-40. More specifically, the government asserted that a public official can be found guilty under § 1346 when he

> fails to disclose the existence of a conflict of interest or violates a state law in connection thereto * * * irrespective of whether the public official took *any* act thereafter, much less a fraudulent or harmful act.

J.A. 42. In petitioner's case, the government moved for leave to prove guilt by showing simply that petitioner never "declared a conflict of interest concerning the [PPT] legislation that benefitted [VECO], nor did [he] request to abstain from voting on that legislation." J.A. 71.

The district court ruled that petitioner's failure to disclose was in full accord with Alaska law. Pet. App. 29a. It also noted that the government had made no reference to any separate federal law disclosure requirement. Pet. App. 30a. Accordingly it denied the government motion to prove its alternative theory as outlined in its papers. Pet. App. 36a.

On appeal, the government did not challenge the court's rulings on Alaska law or the absence of a separate federal law disclosure provision. Instead it argued that an official's failure to disclose a conflict of interest, without more, can violate the right of honest services, even if the conduct is consistent with identifiable state and federal disclosure rules. *See* Brief of Appellant at 14-15, 24, *United States v. Weyhrauch*, No. 07-30339 (9th Cir. Feb. 1, 2008).

In response, the Ninth Circuit reversed the district court ruling, and thus allowed the case to go forward on the government's alternative theory, even absent any claimed breach of a disclosure duty arising under state or federal law apart from § 1346. It takes significant effort to cut through the underbrush in the government's brief and find a defense of this ruling.

II. Assuming It Is Possible To Prove Honest Services Fraud Simply By Showing An Omission To Disclose And No Other Deprivation Of A Right Or Duty, At Least The Disclosure Duty Must Be Proven To Exist Apart From § 1346

A. The government's construction of the statute is wrong for all the reasons advanced in petitioner's opening brief

The government's theory that petitioner violated § 1346 merely by failing to disclose a perceived conflict of interest would leave the disclosure duties of state officials to the vagaries of an alleged federal fiduciary duty of loyalty, criminally enforceable and said to be owed by all public officials to their constituents pursuant to the phrase "right of honest services" in § 1346. GB 26-27, 44-48. This contention must be rejected for all of the reasons set forth in petitioner's opening brief.

Petitioner showed in his opening brief that the government's contentions give short shrift to the words of the statute. The statute's reference to "the right of honest services," and the imposition of heavy criminal penalties for its fraudulent denial, are most reasonably understood in context to require proof of a specific right, and thus an identifiable legal duty of substance. Opening Br. 22-29.

Further, petitioner showed that the government's position also offends this Court's clear statement rule. Opening Br. 30-34. The ultimate point at issue here cannot be made more clearly than this Court made it in *McNally*:

> [I]f state law expressly permitted or did not forbid a state officer such as Gray to have an ownership interest in an insurance agency handling the State's insurance, it would take a much clearer indication than the mail fraud statute evidences to convince us that having and concealing such an interest defrauds the State and is forbidden under federal law.

483 U.S. at 361 n.9. Section 1346, while expressing an intention to criminalize the fraudulent denial of actual intangible rights based on duties found in the law, does not purport to make the "right of honest services" itself a font of substantive disclosure duties of state officials, which supplant and override the duties which otherwise exist in the law.

In addition, any notion that the "right of honest services" embodies "an inherent 'fiduciary duty' to the public," GB 26, carrying with it particular disclosure duties to be determined case-by-case by the federal courts, offends three other principles that have long been clearly enunciated by this Court.

First, it offends the requirement that criminal laws not be unduly vague—that they must give fair warning and not invite discriminatory enforcement. Opening Br. 34-37. Second, as the broadest of all possible interpretations of an arguably ambiguous statute, it also offends the rule of lenity. Opening Br. 37-39. Finally, by requiring the development of a criminally-enforceable disclosure code for state

officials in the absence of a clear congressional mandate or significant federal interest,[4] it offends this Court's longstanding aversion to federal common law making. Opening Br. 39-44.

B. The government's analysis in support of its extreme construction of the statute is unsound on its face

The government does not begin to respond to petitioner's contentions until page 40 of its brief. Instead, it purports to rely primarily on pre-*McNally* case law and the principle that whatever went then should go now. GB 21-35.

What the Solicitor General offers by way of actual legal analysis to support its position is more of the loose thinking and prosecutorial overreaching that have brought the statute to its current indeterminate state. Rather than deal with the words of the statute, the government dismisses those words as a "term of art," to be skipped over in favor of resort to the pre-*McNally* case law. GB 11.

Based on those cases, the government asserts that state officials must satisfy a general, federal law fiduciary duty of loyalty, including independent, criminally-enforceable disclosure duties, all flowing

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[4] In the area of public corruption, state citizens and their public officials generally expect "their rights and obligations would be governed by state-law standards." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991). The government's claimed federal interest in combating state and local corruption, GB 50-51, appears to be fully and appropriately served by the Justice Department's ability to intervene when public officials fail to perform disclosure duties that are actually owed under existing laws and local prosecutors fail to act.

from nothing but the words, "right of honest services." GB 26-27, 44-46. This effort to federalize the disclosure duties of state officials is both unsupported by the statute's text, and completely unworkable.

This Court may conclude, as *amicus* NACDL argues, that a statute criminalizing the fraudulent denial of "honest services" is vague beyond repair, and thus unconstitutional. Brief for National Ass'n of Criminal Defense Lawyers as *Amicus Curiae* Supporting Petitioner at 14-15, *Weyhrauch v. United States*, No. 08-1196 (U.S. Sept. 21, 2009). But a reasoned effort to read those words in a disciplined way can avoid some of its most extreme abuses. The government's brief shows no interest in that endeavor.

1. **Rather than interpret the words of the statute, the government proclaims "the right of honest services" to be a term of art that simply reincorporates the pre-*McNally* case law**

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). More specifically, words in a statute "should be interpreted whenever possible according to common usage." *Barber v. Gonzales*, 347 U.S. 637, 641 (1954). Yet the government relieves itself of any need to discuss the words of the statute by its *ipse dixit* pronouncement that the phrase is a "term of art" with a preexisting meaning. GB 11.

A term of art, however, is one or more words that have acquired a meaning that is "fixed * * * wherever it is used." *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 315 (1978). Such an "unambiguous[] * * * meaning," *Int'l Union of Elec., Radio & Mach. Workers, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 243 (1976), can result from, and be settled by, "long usage and judicial construction." *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 353 (1897) (White, J., dissenting).

The phrase "intangible right of honest services" cannot be such a term of art because, in fact, pre-*McNally* courts did not use the term at all. And the government's suggestion that it could nonetheless still be a term of art because Congress intended the phrase to act as a stand-in for "analogous formulations," GB 21, is truly remarkable.

The government has conceded that because pre-*McNally* courts "announced conflicting rules," "Congress could not have intended to restore every single pre-*McNally* decision." GB 32. Petitioner is aware of no other case where this Court ignored the meaning of the words of a statute, because it deemed a certain previously unused phrase a term of art standing for various other formulations that lack a consistent meaning. *See* GB 21. There is plainly no reason that § 1346 should not be construed in accordance with the ordinary meaning of the words Congress used. *See* Opening Br. 22-29.

2. The government's reliance on context and purpose, legislative history, and alleged canons of construction is equally unpersuasive

a. The government argues that, at a minimum, the statute was intended to reverse this Court's holding in *McNally,* and claims, without basis, that but for its reading of the statute, the *McNally* defendants would be left "beyond the reach of the mail fraud statute notwithstanding Section 1346." GB 18.

The conduct of the *McNally* defendants appears clearly to come within the statute, when § 1346 is read to require the fraudulent denial of a duty that is actually owed under some provision of law. As the government recognizes, GB 16, far from a simple omission to disclose information, the central wrong in *McNally* was the surreptitious use of official position to direct commissions from workers' compensation insurance contracts to the defendants, conduct which the *McNally* defendants "[s]urely * * * knew" was unlawful. 483 U.S. at 375 (Stevens, J., dissenting). Indeed, section 173 of the Kentucky Constitution has long made it a felony for any public official at any level of government to "receiv[e], directly or indirectly, * * * any interest, profit or perquisites arising from * * * moneys to be raised through his agency." *See* KY. REV. STAT. ANN. § 45A.455(2) (2009; effective 1980); *id.* § 11A.020(1)(c) (2009; effective 1992); *Commonwealth v. Howard*, 379 S.W.2d 475, 478 (Ky. 1964); *Miller v. Porter*, 47 Ky. (8 B. Mon.) 282, 283-85 (1847).

b. The government's recitation of § 1346's legislative history, GB 35-39, likewise fails to support its position. The recited legislative history is

composed principally of statements by legislators who either took the fanciful position that § 1346 was designed to reinstate all pre-*McNally* case law—a view which even the government is unwilling to defend, GB 32—or the unremarkable position that § 1346 was intended to "reverse the *McNally* decision and allow Federal prosecutors" to predicate an honest services charge on the deprivation of an intangible right. *See* GB 37-39.

c. The government's reliance on canons of construction, GB 18-19, is likewise unavailing. It cites a background assumption that federal statutes are not usually "'dependent on state law,'" *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989), and the corollary that Congress "has repeatedly used express text" to depart from that assumption. GB 18-19. It does not follow, however, that the meaning ascribed to § 1346 "must be wholly the product of a federal court's own devising," *Kamen*, 500 U.S. at 98, or that its substantive content "is not to be determined by state * * * law" in some respects. *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956). And where a statute punishes fraudulent deprivations of intangible rights to services, growing out of a relationship between a state official and his government, it is obvious that many if not all of the rights in issue will be creatures of state law.

3. The meaning of "honest services" that the government conjures up from the pre-*McNally* cases—as imposing a federal fiduciary duty of loyalty to be defined by federal courts—offers no guidance in determining generally applicable rules of disclosure for public officials

The government asserts that every public official has a generalized duty to disclose information based on the "common law principle that a public official owes an inherent 'fiduciary duty' to the public." GB 26. That "fiduciary duty," the government claims, means that all public officials owe their constituents the "normal fiduciary duties of a trustee, *e.g.*, honesty and loyalty." GB 26 (quoting *United States v. Gray*, 790 F.2d 1290 (6th Cir. 1986) (internal quotation marks omitted)). The government maintains that duty has been incorporated into § 1346 as an element of the crime of mail fraud. GB 44-46.

In a single stroke, the government thus would transform § 1346 from a criminal sanction for the fraudulent denial of rights and duties that otherwise exist in the law, to an independent source of substantive duties of the vaguest and most uncertain sort.

There are many types of fiduciaries under the law, each with varying duties, "including agents, partners, directors and officers, trustees, executors and administrators, receivers, bailees, and guardians." Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 795 (1983). It has long been clear that the obligations owed by a fiduciary vary depending on the fiduciary's particular role. *See* George Gleason Bogert, HANDBOOK OF THE LAW OF TRUSTS 16-42

(1921) (distinguishing between variable fiduciary duties owed in a trust and eleven other fiduciary relationships, including executorships, guardianships, and officers of corporations); *see also United States v. Margiotta*, 688 F.2d 108, 142 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part) (the "most notable feature" of the common law governing fiduciary obligations "is the degree to which fiduciary obligations vary from relationship to relationship"). The same point was made in a case argued earlier this Term: the word "fiduciary" "appear[s] in diverse settings" and has a "context-dependent nature." Brief of Securities Industry & Financial Markets Ass'n as *Amicus Curiae* Supporting Respondent at 9-14, *Jones v. Harris Assocs.*, No. 08-586 (U.S. Aug. 27, 2009) (collecting cases illustrating varying fiduciary duties).

Thus, when the government says that a public official is a "fiduciary," it "only begins [the] analysis" and "gives direction to further inquiry," such as: "What obligations does he owe as a fiduciary?" *SEC v. Chenery Corp.*, 318 U.S. 80, 85-86 (1943). While the duties of a trustee of a legal incompetent are quite high and discernible based on the dependent, helpless character of the beneficiary, and the trustee of a trust fund can easily understand that he owes a duty not to embezzle the fund's proceeds, not to self-deal with its property, and not to invest the money improvidently, the disclosure duties owed by a

legislator, where no one has troubled themselves to set up particular rules, are a substantial mystery.[5]

Because "the common law has never developed a substantial body of precedents dealing with the disclosure obligations of the public official," John C. Coffee, Jr., *Modern Mail Fraud*, 35 AM. CRIM. L. REV. 427, 453 (1998), the only guideposts available to a public official are the "honest services" cases themselves. Yet there is no consensus among those cases as to the character and extent of a public official's fiduciary duties to his constituents.[6] More fundamentally, because the nature and extent of specific obligations owed under a fiduciary duty are

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[5] Of course, Alaska has set up particular rules and explicitly superseded any "inherent" or "common law" disclosure duties. *See* ALASKA STAT. § 24.60.020 (2007).

[6] *Compare United States v. Holzer*, 816 F.2d 304 (7th Cir.) (public official's duty akin to trustee's), *vacated on other grounds by* 484 U.S. 807 (1987), *with Burton Twp. v. Speck*, 144 N.W.2d 347, 350 (Mich. 1966) (public official's duty akin to agent's). And, while some jurisdictions expansively define a public official's fiduciary duty, *Pressey v. Twp. of Hillsborough*, 117 A.2d 646, 648-49 (N.J. Super. Ct. App. Div. 1955) ("'an inescapable obligation to serve the public with the highest fidelity * * * and above all to display good faith, honesty and integrity'"), others construe the duty more narrowly. *See State ex rel. Cook v. Seneca County Bd. of Comm'rs*, 889 N.E.2d 153, 161 (Ohio Ct. App. 2008) (public officials have no "fiduciary duty in legislative decisionmaking"); *United States v. DeVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) (public officials' fiduciary duty is simply "to make governmental decisions in the public's best interest"). Some states have even determined that public officials owe no fiduciary duties to reveal possible future conflicts of interest. *See Anderson v. City of Parsons*, 496 P.2d 1333, 1337 (Kan. 1972).

dependent on context, there is no practical way for a public official to determine, in the abstract, what sorts of perceived conflicts of interest he must disclose and to whom.

This is especially true for state legislators, who vote on matters that cover most any aspect of everyday life. Like others, they have families, relatives, friends, business and investment dealings, and maybe a hobby or two. They also bring to their job a point of view, a life history, and perhaps have made speeches and written books and articles. Simply telling a public official that he has a "fiduciary duty of loyalty" to disclose that which the public might believe could affect his job performance does little to assist him in defining the sorts of disclosures that are required.[7]

This problem is especially acute under the government's alternative theory of honest services fraud, which would require proof only of a material nondisclosure of information in violation of some duty to disclose, and no conduct at all amounting to any other misconduct of his office. Is a state legislator required, under the government's theory, to disclose every lobbyist contact concerning particular legislation, absent any law so requiring? What about a conversation about pending legislation with his wife? Or friend? Or with a constituent who

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[7] This issue is not unlike the questions that confront judges in their decisions whether to recuse in a particular case or to disclose some measure of familiarity with persons appearing before them. All of these issues involve uncertain judgments of degree, unsuited to enforcement by criminal sanctions absent specific bright-line rules.

buttonholes him in the district? What if the legislator has a distant cousin in the oil business who will prosper under one legislative outcome? Does the mere fact that some or all of these facts might be of interest to someone mean that the official has a fiduciary duty to disclose them? If so, there is no end of what he must disclose. And, if not, there is no conceivable way to know either what must be disclosed, or what means of disclosure will be sufficient to avoid prosecution by the United States Attorney.

The obvious answer to these questions is that governments are capable of defining the disclosure duties that are owed by their officials, and must do so if they seek to hold officials criminally liable for a simple omission to disclose. Where both the state and federal governments have failed to impose any such discernible duty, and, as under the government's alternative theory, there is no assertion that concealment was a means of achieving the deprivation of any other right or entitlement, any claim of criminality must be rejected out of hand. It obviously cannot be maintained on the premise that § 1346's "right on honest services" is itself the font of criminally-enforceable disclosure duties.

C. The government's claimed right to prove honest services fraud based solely on a breach of a disclosure duty found only in § 1346 is contradicted by its own repeated statements and by its overview of the pre-*McNally* case law

1. The government both briefly affirms and expressly rejects its alternative theory that honest services fraud is committed by an official who continues in office while failing to disclose a conflict of interest, but does not misuse his authority in response to it

At only a handful of places does the government's brief even address the question before the Court—whether honest services fraud is established simply by showing a public official's failure to disclose a "conflict of interest," where no law other than § 1346 required disclosure and the official does nothing improper but continues to perform his job following the nondisclosure.

That the government knows this to be the issue in this case is suggested by the brief's primary argument heading, which addresses "A State Official's Violation Of The Honest Services Statute By Taking Official Action While Intentionally Concealing A Material Conflict Of Interest * * * ." GB 13 (capitalization modified). For the theory thus enunciated demands nothing more than continued performance of official duties following the nondisclosure, not any exercise of power in an abusive way.

In addition to four other very short references scattered throughout the brief—GB 11, 14 (twice), and 27—this theory, on which the entire case turns,

is enunciated in only one additional instance, and this time with greater clarity:

> Failures to disclose a conflict of interest concerning official action also constituted a recognized form of honest-services fraud before *McNally*. When an official takes action in such circumstances, he purports to act as a loyal, disinterested public servant, but deprives the public of its right to determine for itself whether he is operating in the public's best interest. *The crux of the violation in such a case is the official's deliberate concealment from the citizenry of matters that might reasonably be thought to corrupt the official's decisions.*

GB 25 (emphasis added). Finally, here, the government's brief is explicit and clear in elaborating the "alternative" pure nondisclosure theory on which it caused its case to turn by filing its motion in limine in the district court, J.A. 42 (quoted supra at 5), and which it boldly defended in the court below.[8]

But the government's few defenses of the proposition actually at issue are surrounded and overwhelmed by clearer statements of a far more plausible character that contradict its essential claim in this case. Indeed, in the very first sentence of its summary of argument, the government asserts:

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[8] In the Ninth Circuit, the government argued that "honest services fraud charges may be proven * * * through evidence demonstrating that the official knowingly failed to disclose a conflict of interest in connection with his or her official position." Brief of Appellant at 23, *Weyhrauch*, No. 07-30339; *see id.* at 26.

> The honest-services prohibition in 18 U.S.C. [§] 1346 covers a state official's concealment of a material conflict of interest *while taking official action that furthers that undisclosed interest.*

GB 9 (emphasis added). This assertion is completely beside the point of the government's alternative theory, whose critical innovation is that honest services fraud is shown based simply on an act of nondisclosure, without showing that, thereafter, "the public official took *any* act * * * much less a fraudulent or harmful act." J.A. 42.

Several other statements in the government's brief echo and give emphasis to this first sentence of its summary of argument. These formulations are invoked most forcefully to argue that its reading of the statute is not unduly vague and uncertain. The government reassures us that the statute actually "require[s]" not just the concealment of a conflict of interest while continuing to serve, but also use of official authority to advance ulterior interests:

> Schemes to deprive others of "the intangible right of honest services" *require* that a public official, agent, or someone who owes a comparable duty of loyalty breaches that duty by *secretly acting in his own interests* while purporting to act in the interests of his principal.

GB 44 (emphases added).[9] Again on page 45, the government states that § 1346:

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[9] The government's favorable citation to *United States v. Rybicki*, GB 44, for this proposition is telling. The Second

> *criminalizes only schemes in which an employee or public officer takes official action to further his own interests* while pretending to act in the interests of those to whom he owes a duty of loyalty.

GB 45 (emphasis added).

Lest there be any doubt the government means what it says, it used virtually these exact words in its brief in *Black* to likewise give reassurance of the reasonable limits on § 1346. Brief for the United States at 36-37, *Black v. United States*, No. 08-876 (U.S. Sept. 30, 2009) (stating that § 1346 "criminalizes only schemes in which an employee or public officer secretly takes official action to further his own interests while pretending to act in the interests of those to whom he owes a duty of loyalty"); *see also id.* at 35-36.

These categorical assertions that § 1346 must be read to require not only concealment of a perceived conflict of interest, but also a public official's use of his authority to advance his own interests, are in direct contradiction of the government's alternative theory of liability. For that reason, among many others, this Court should reject the government's

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(continued...)

Circuit there concluded that "[i]n bribery or kickback cases, the undisclosed bribery itself is sufficient to make out the crime, but in self-dealing cases, the existence of a conflict of interest alone is not sufficient to do so." *United States v. Rybicki*, 354 F.3d 124, 141 (2d Cir. 2003) (en banc).

alternative theory of liability and reverse the decision below.

2. The government's extensive citation of pre-*McNally* case law is inapposite, because the cases nearly all involve bribery, kickbacks, and self-dealing, where concealment was simply part of the fraud scheme and not, as here, the only honest service alleged to be denied

The government purports to rely on the pre-*McNally* case law as the source of its theory that § 1346 itself imposes a fiduciary duty of loyalty that gives rise to criminal punishment for intentional omissions to disclose conflicts of interest, where the official continues in office but no other improper conduct is proven. GB 14. But even if the statute made that case law dispositive, which it does not, the government's own discussion of these cases makes clear that they do not support its position.

According to the government, the pre-*McNally* cases:

> typically involved the prosecution of state or local officials who committed two types of crimes: (1) accepting a bribe or kickback in exchange for official action or (2) taking action within the scope of officials duties *to further his undisclosed personal interest*—with the same course of conduct sometimes implicating both types of fraud.

GB 23 (emphasis added). To the extent that these two categories encompass the universe of pre-*McNally* cases, they lend no support at all to the government's alternative theory for one simple reason: Both categories of cases involve the breach of

some other actual legal duty—generally some other misuse of official authority—in addition to nondisclosure itself.

In the bribery/kickback cases discussed by the government, GB 23-24 & nn.5-6, some payment or benefit is typically conveyed in exchange for commission of an improper official act. In fact, though, such improper official act to advance the briber's objective probably is not essential, since an alternative misuse of authority likely occurs when one uses the influence of a public position to induce payments for one's personal benefit. *See Rybicki*, 354 F.3d at 141 ("In bribery or kickback cases, the undisclosed bribery itself is sufficient to make out the crime."). In either case, however, the essential wrong is not simply the act of nondisclosure. It is rather misuse of official position, usually for personal gain, with the nondisclosure used as a fraudulent device aiding the achievement of that end.

The second category of cases, "taking action within the scope of official duties to further * * * undisclosed personal interest," is generally referred to as self-dealing. Like bribery and kickbacks, it involves the misuse of official authority to advance personal objectives, which misconduct is the deprivation of honest service. In self-dealing cases, as well, the nondisclosure is not itself the object of the fraud or the honest service denied, but rather the fraudulent means to evade detection of the primary wrong.

Pre-*McNally* decisions say as much, as the government takes pains to note. GB 44-45. Some of these cases, moreover, were emphatic to reverse convictions precisely because they rested on simple nondisclosure of a conflict of interest.

In *United States v. Dixon*, 536 F.2d 1388, 1400-01 (2d Cir. 1976), for example, Judge Friendly noted that the evidence:

> was simply that Dixon had caused the mails to be used to receive proxies solicited by a proxy statement which did not contain the information about loans to Dixon that it should have contained. To hold that this [nondisclosure] constituted a violation of the mail fraud statutes would stretch its words beyond normal bounds * * * ."

Likewise, in *United States v. Rabbitt*, 583 F.2d 1014, 1026 (8th Cir. 1978), the court reversed a state legislator's conviction based on his concealed interest in an enterprise receiving government contracts because he "did not, in his official capacity, control the awarding of state contracts to architects," and thus lacked the power to self-deal.

Tellingly, the government's *Black* brief cites both *Rabbitt* and *Dixon* favorably for the proposition that "existing boundaries can provide clarity about the statute's coverage." *Black* GB 39-40.

Despite its generally accurate description of the categories of pre-*McNally* cases, the government's discussion ultimately morphs the concept of self-dealing into the more pliable and encompassing category of "[f]ailures to disclose a conflict of interest *concerning* official action," GB 25 (emphasis added), without regard to whether the related performance in office was self-motivated or entirely upright and proper. It does this because it must, if it is to be allowed to pursue its alternative theory that petitioner may be prosecuted for nondisclosure,

"irrespective of whether [he] took *any* act thereafter, much less a fraudulent or harmful act," J.A. 42.

While the government purports to rely on a handful cases in support of its theory of honest services fraud based only on "an official's breach of th[e fiduciary] duty [to disclose] while taking official action in the face of a conflict," GB 27, those cases do not support its position either.

In *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), for example, a party political chairman was found to wield governmental power to direct the county's insurance business, and on that basis to owe a fiduciary duty as a governmental official. The "crux" of the "impropriety" on which the conviction rested was a "secret scheme, pursuant to which" he recommended that a certain insurance agency receive the government's business, "on the understanding that the Agency would kick back a portion of its compensation to Margiotta's political allies." *Id.* at 127. There is no suggestion that a bare nondisclosure in lieu of this fraudulent solicitation of kickbacks would somehow have sufficed.

The three additional cases the government centrally relies upon likewise involve nondisclosure as a means to cover up the ultimate corrupt action.

In *United States v. Holzer*, 816 F.2d 304, 307-08 (7th Cir. 1987), a Cook County judge "used his public office to obtain money" in the form of "loans" from lawyers and failed to disclose them as required, thus abusing his official position and "depriv[ing]" the State of the "benefits" of its decision "that judges shall not be compensated out of fees paid by the litigants."

Similarly, in *United States v. Silvano*, 812 F.2d 754, 760 (1st Cir. 1987), the Boston city budget director arranged for a city health insurance contract to be awarded based on the facially inadequate bid submitted by a friend, and then "used his position to attempt to extort money" from another insurer whose bid had thus wrongly been rejected.

Finally, in *United States v. Bush*, 522 F.2d 641, 647-48 (7th Cir. 1975), a city public relations director "used his official position within the mayor's inner circle to exert * * * substantial influence" over the award of an advertising contract to his own company, "took steps to insure that the proceeds of the venture could not be traced to him, [and] misrepresented his interest."

Each of these decisions contains unsurprising language noting the wrongfulness of concealing the misuses of office and breaches of duty that are the "crux" of the fraud in each case. Such language lends no support to the government's effort in this case to establish honest services fraud based simply on an omission to disclose, in violation of no duty found anywhere outside of § 1346.

III. The Court Should Reject The Government's List Of "Three Basic Non-Jurisdictional Elements" Of Honest Services Fraud, Which Would Eliminate The Need To Prove Fraud As That Word Is Generally Understood

The government's answering brief asserts, for the first time in this case, that "[h]onest-services fraud contains three basic non-jurisdictional elements: (a) a breach of the duty of loyalty; (2)(sic) intent to deceive; and (c) materiality." GB 44; *Black* GB 35. While for the reasons set forth above, the

decision below is incorrect quite apart from the propriety of these elements, the government's assertion merits attention in any effort to address the overall reach of the statute.

Petitioner submits that the government's formulation of the elements should be rejected, not only because it requires proof of no legitimate or coherent duty actually breached, but also because it is an effort to circumvent the requirement to prove fraud as commonly understood.

The most common understanding of fraud—which is undeniably an element in the proof of any violation of § 1346, *see McNally*, 483 U.S. at 362 (Stevens, J., dissenting)—is the use of material misrepresentation, concealment, or other deception to deny one or more others something of value to which they are entitled.[10]

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[10] As this Court noted in *McNally*, "the words 'to defraud' * * * 'usually signify the deprivation of something of value *by* trick, deceit, chicane or overreaching.'" 483 U.S. at 358 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)) (emphasis added). The same point was acknowledged in Justice Stevens' dissent, *id.* at 370-71, in its quotation of dictionaries from around the time of the mail fraud statute's enactment. The referenced dictionaries provide that "[t]o defraud is to withhold from another that which is justly due to him, or to deprive him of a right by deception or artifice," 1 BOUVIER'S LAW DICTIONARY 530 (1897) (internal quotation marks omitted); and define "defraud" as "[t]o cheat; to deceive; to deprive of a right by an act of fraud * * * to withhold from another what is justly due him, or to deprive him of a right, by deception or artifice." William C. Anderson, A DICTIONARY OF LAW 474 (1893) (internal quotation marks omitted). *See also* 483 U.S. at 370 (Stevens, J., dissenting) (quoting 1 Joseph Story, EQUITY JURISPRUDENCE § 186, at 189-90 (1870) (defining fraud as "every artifice made

Petitioner submits that adherence to the common understanding of fraud, as requiring the use of deception or trickery to effect a deprivation of some tangible or intangible right, is commanded by the statute's words. Moreover, requiring that *deception be a means of achieving the deprivation* at issue forecloses use of the statute to prosecute a public official's simple failure to disclose information unaccompanied by any other abuse of power, and leaves the disclosure duty violation to be addressed on its own terms. Conversely, by stating the supposed "elements" as a list, with no requirement that material, intentionally deceptive conduct *be a means* of accomplishing the deprivation of the intangible right, the government converts a simple breach of a duty to disclose into a fraudulent denial of honest services.

Assuming, contrary to the facts of this case, that an official knowingly breaches an actual duty to disclose certain information, but does nothing more and has no intention to misuse his authority in any respect, the government's list of elements would allow the following circular analysis: The knowing breach of the disclosure duty is both the honest service denied and the intentionally deceptive act. *See* GB 44-48. And the nondisclosure is material, since the statute required it to be done, and

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(continued...)

use of by one person for the purpose of deceiving another," or as "any cunning, deception, or artifice used to circumvent[,] cheat, or deceive another") (internal quotation marks omitted)).

disclosure might well "make a difference to the way reasonable voters or fellow office holders assess" the propriety of the official's performance. GB 49.[11]

The range of prosecutions thus enabled is illustrated by the case of a federal judge, who, out of annoyance at the burden, submits by mail a letter stating his refusal to fill out his financial disclosure form, and on that account breaches a clear disclosure duty. On its face, under the circular reasoning just described, the government's list of elements would bring this conduct within the mail fraud statute. This result makes no sense. While the judge should bear whatever sanction attaches to his breach of duty, absent some other improper purpose to misuse his authority in some way that the nondisclosure furthers, he has not committed a mail fraud.[12]

Thus, the government's reliance on a list of elements, in lieu of requiring intentional, material

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[11] The government concedes that the propriety of a given act of nondisclosure under state law is relevant though not dispositive in determining whether a given failure to disclose involves intent to deceive and is material. GB 48-49. Thus, when all is said and done, the government seems to be defending a uniform federal common law rule of the disclosure duties of state officials, which will be applied differently in different states because contrary state laws will affect factual conclusions about materiality and intent to deceive.

[12] The judge's case is arguably distinguishable from a public official who submits a required disclosure form but deliberately omits some of the required information. Such action may amount to a false statement denying the existence of facts whose disclosure is required, and thus may amount to a deceptive act committed in order to deny the honest service—here the required public disclosure—at issue.

deception as a means to facilitate some other breach of duty or deprivation, is one of two critical elements in its bootstrap effort to convict petitioner because he did not publicly announce particular employment discussions. The other critical element is reliance on a made-up duty to disclose, that exists nowhere in the law apart from § 1346. The Court should take this opportunity to reject the government's position in both respects.

CONCLUSION

For the reasons set forth above, and in petitioner's opening brief, the decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

140

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IN THE

Supreme Court of the United States

BRUCE WEYHRAUCH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ALBERT W. ALSCHULER AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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349

QUESTION PRESENTED

Whether, to convict a state official for depriving the public of its right to honest services through the nondisclosure of material information, in violation of the mail-fraud statute (18 U.S.C. Sec. 1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. FEDERAL MAIL FRAUD AND STATE LAW: THREE VIEWS	3
A. An Indispensable Element	4
B. One Path to Conviction but not the Only Path	5
C. Irrelevant	8
II. TWO CLEAR STATEMENT PRINCIPLES	11
A. *Jerome v. United States*	12
B. *Cleveland v. United States*	14
III. STANDING FEDERALISM ON ITS HEAD	16
IV. COMPARED TO WHAT? THE APPROPRIATE FEDERAL STANDARD	19
A. Nondisclosure of Material Information	21
B. Self-Dealing	26
C. Quid Pro Quo Bribes and Kickbacks	28
CONCLUSION	33

TABLE OF AUTHORITIES

CASES	Page
Abbott v. United States, 239 F.2d 310 (5th Cir. 1956)	25
Black v. United States (U.S. No. 08-876)	29
Carpenter v. United States, 484 U.S. 19 (1987)	15
Cleveland v. United States, 531 U.S. 12 (2000)	2, 15, 16
Epstein v. United States, 174 F.2d 754 (6th Cir. 1949)	27
In re Will of Gleeson, 124 N.E.2d 624 (Ill. App. Ct. 1955)	26
Jerome v. United States, 317 U.S. 606 (1943)	12
Jerome v. United States, 318 U.S. 101 (1943)	2, 12, 13, 14
McNally v. United States, 483 U.S. 350 (1987)	4, 15, 20, 24, 25, 27, 29, 30, 31, 32
Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)	13
Neder v. United States, 527 U.S. 1 (1999)	22
NLRB v. Hearst Publs., 322 U.S. 111 (1944)	13
NLRB v. Natural Gas Utility Dist., 402 U.S. 600 (1971)	13
Piatt v. Longworth's Devisees, 27 Ohio St. 159 (1875)	26
Sorich v. United States, 129 S. Ct. 1308 (2009)	7
Taylor v. United States, 495 U.S. 575 (1990)	14
United States v. Barta, 635 F.2d 999 (2d Cir. 1980)	27

TABLE OF AUTHORITIES—Continued

Page

United States v. Bloom, 149 F.3d 649 (7th Cir. 1998) 19, 29
United States v. Bohonos, 628 F.2d 1167 (9th Cir. 1980) 24
United States v. Brumley, 116 F.3d 728 (5th Cir. 1997) (en banc) 4, 5, 14, 18, 19
United States v. Bruno, No. 09-CR-29, 2009 U.S. Dist. LEXIS 74278 (N.D.N.Y. 2009) 10
United States v. Bryan, 58 F.3d 933 (4th Cir. 1995) 8
United States v. Bryza, 522 F.2d 414 (7th Cir. 1975) 25
United States v. Bush, 522 F.2d 641 (7th Cir. 1975) 25
United States v. deVegter, 198 F.3d 1324 (11th Cir. 1999) 10, 28, 30
United States v. Frost, 125 F.3d 346 (6th Cir. 1997) 10, 30
United States v. Ganim, 510 F.3d 134 (2d Cir. 2007) 11
United States v. George, 477 F.2d 508 (7th Cir. 1973) 25
United States v. Gray, 790 F.2d 1290 (6th Cir. 1986), *rev'd*, *McNally v. United States*, 483 U.S. 350 (1987) 32
United States v. Grubb, 11 F.3d 426 (4th Cir. 1993) 8
United States v. Hassenstab, 575 F.2d 1035 (2d Cir. 1978) 25
United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974) 31

TABLE OF AUTHORITIES—Continued

Page

United States v. Jain, 93 F.3d 436 (8th Cir. 1996)..... 29, 30
United States v. Jennings, 487 F.3d 564 (8th Cir. 2007)..... 8
United States v. Jerome, 130 F.2d 514 (1942), *rev'd*, 318 U.S. 101 (1943)..... 12
United States v. Kincaid-Chauncey, 556 F.3d 923 (9th Cir. 2009)..... 22, 24
United States v. Kott, No. 07 CR 56, 2007 U.S. Dist. LEXIS 66125 (D. Alaska Sept. 4, 2007), *rev'd*, 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (June 29, 2009) (No. 08-1196)..... 16
United States v. Louderman, 576 F.3d 1383 (9th Cir. 1978)..... 8-9, 25
United States v. Martin, 228 F.3d 1 (1st Cir. 2000)..... 29-30
United States v. Martin, 195 F.3d 961 (7th Cir. 1999)..... 5, 19
United States v. McCracken, 581 F.2d 719 (8th Cir. 1978)..... 27-28
United States v. Murphy, 323 F.3d 102 (3d Cir. 2003)..... 4, 5
United States v. Nardello, 393 U.S. 286 (1969)..... 14
United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003)..... 3, 10, 11, 20, 21, 27, 28, 30, 33
United States v. Sawyer, 239 F.3d 31 (1st Cir. 2001)..... 8
United States v. Segal, 495 F.3d 826 (7th Cir. 2007)..... 6, 20
United States v. Sorich, 523 F.3d 702 (7th Cir. 2008)..... 6, 7, 20, 28

TABLE OF AUTHORITIES—Continued

Page

United States v. Thompson, 484 F.3d 877 (7th Cir. 2007) 3, 20, 21, 28
United States v. Turley, 352 U.S. 407 (1957) 14
United States v. Warner, 498 F.3d 666 (7th Cir. 2007) 6, 20
United States v. Weyhrauch, 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (June 29, 2009) (No. 08-1196) ..... *passim*
United States v. Vineyard, 226 F.3d 320 (4th Cir. 2001) 30
Weyhrauch v. United States, 129 S. Ct. 2863 (2009) 12

STATUTES

18 U.S.C. §§ 1341 and 1346 ..... *passim*
18 U.S.C. § 1956(c)(7)(A) 18
18 U.S.C. § 1961(1) 18
48 Stat. 783 (1934) 12
50 Stat. 749 (1937) 12
Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 §903, 116 Stat. 745 (2002) 18
Alaska Stat. (2008)
§24.60.030(f) 17
§24.60.030(g) 23
§24.60.040 22
§24.60.170 17
§24.60.170(g) 17
§24.60.178 17
§24.60.990(a)(6) 23
Cal. Gov't Code §82029 23
Cal. Gov't Code §87103(a) 23
D.C. Code §1-1106.01(i)(5) 23
5 ILCS 420/4A-102 (2009) 17

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS

Page

134 Cong. Rec. H11251 (daily ed. Oct. 21, 1988) 31, 32

Albert Alschuler, *The Mail Fraud and RICO Racket: Thoughts on the Trial of George Ryan*, 9 Green Bag 2d 113 (2006). 6

Keeping Lawmakers Happy Through Gifts to Pet Charities, N.Y. Times, Oct. 19, 2008, at A1 21

John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929 (2005) ... 26

William H. Rehnquist, *Remarks on the Federalization of Criminal Law*, Address Before the American Law Institute (May 11, 1998), *in* 11 Fed. Sentencing Rep. 132 (1998) 33

Restatement of Torts Second §583 22

1 Marshall Shapo, The Law of Products Liability §2.02[4] (4th ed. 2001) 22

Dan Slater, *From Coaches to Church Officials, An Honesty Law Gets a Workout*, Wall St. J., Feb. 5, 2009, at A14 7-8

Senate Judiciary Committee Report, 134 Cong. Rec. S17360-02 (daily ed. Nov. 10, 1988) 32

Stephen F. Smith, *Proportionality and Federalization*, 91 Va. L. Rev. 879 (2005) 33

Uniform Trust Code §802, comment 26

INTEREST OF *AMICUS CURIAE*

I am a member of the Illinois Bar, a Professor of Law at Northwestern University, and Julius Kreeger Professor of Criminal Law and Criminology, Emeritus, at the University of Chicago. My interest in this case is simply that of a friend of the Court. The Courts of Appeals have taken at least three positions on the issues presented by this case, and the adversary presentation of only two of these positions may not apprise the Court fully of the interests at stake and the applicable law.[1]

SUMMARY OF ARGUMENT

The Courts of Appeals have offered three views of the significance of state law in federal prosecutions for honest-services mail fraud: (1) A violation of state law is necessary to establish a federal violation; (2) although a violation of state law can establish the central element of honest-services fraud (breach of fiduciary duty or misuse of office), the Government may also establish this element without proving any state law violation; and (3) state law violations are immaterial, as the term "honest services" must have a uniform national meaning. The three positions

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[1] Pursuant to Rule 37.6, I declare that no counsel for a party authored this brief in whole or in part and that I am the only person who has made a monetary contribution to the preparation and submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. I acknowledge the exceptional research assistance of Steven Art and David Baltmanis.

thus treat state law violations as (1) indispensable, (2) unnecessary but sufficient,[2] and (3) irrelevant.

This brief contends that the first two positions—both of which interpret the term "honest services" to incorporate state law—are incompatible with sound principles of federalism and with this Court's decision in *Jerome v. United States*, 318 U.S. 101 (1943). *Jerome* and its progeny require a clear statement by Congress before state law is used to define a federal crime.

The first two readings are also incompatible with another clear statement principle. *Cleveland v. United States*, 531 U.S. 12 (2000), requires a clear congressional statement before a federal statute is read to alter the federal-state balance in the prosecution of crime. Bootstrapping state regulatory violations and minor criminal offenses into twenty-year federal felonies and placing both public officials and private individuals on trial for these offenses in the federal courts unmistakably transform the federal-state balance.

Although the Ninth Circuit held correctly in this case that the federal mail fraud statute should have a uniform national meaning, this Court should not approve the sweeping, ill-defined standard of liability the Ninth Circuit announced—one that would make a serious federal crime of every material nondisclosure of a conflicting interest by a state official. The breadth and vagueness of this standard might well

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[2] At least when accompanied by proof of the other elements of an honest-services violation, which vary from circuit to circuit. They include some combination of mailing, fraudulent intent, materiality, risk of economic harm, and anticipated personal gain.

prompt a court to embrace a state-law limiting principle, especially when this principle is the only alternative the adversary system presents. In this case, however, the adversary system sets a trap. The appropriate response to the Ninth Circuit's theory of honest-services fraud is not the federalization of state ethical regulations and their transformation into twenty-year felonies. It is to declare that the non-disclosure of material information does not itself constitute honest-services fraud.

The governing standard should be no broader than the one the Second Circuit approved in *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc), a standard that (at least for defendants other than public officials) limits honest-services fraud to schemes to obtain bribes or kickbacks or to engage in undisclosed self-dealing capable of causing economic detriment. An even better standard would be the one Judge Easterbrook proposed in *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007). After declaring that his court might need to reduce the risk of uncertainty posed by its current standard, Judge Easterbrook noted that limiting the statute to cases of bribes and kickbacks would be consistent with its language and history. *Id.* at 883-84.

ARGUMENT

I. FEDERAL MAIL FRAUD AND STATE LAW: THREE VIEWS

The Courts of Appeals have taken three positions on the role of state law in federal honest-services mail fraud prosecutions. The Fifth Circuit and probably the Third hold that there can be no deprivation of the intangible right to honest services without a state law violation. Decisions in several other cir-

cuits declare that a state law violation can establish the central element of honest-services fraud but that a deprivation of honest services also can be established without such a violation. And decisions in still other circuits say that federal law determines when an honest services violation has occurred, so that whether a defendant has violated state law does not matter.

A. An Indispensable Element

In *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997) (en banc), the Fifth Circuit concluded that the term "honest services" means "services owed under state law." It held that the government could not establish a deprivation of the intangible right to honest services without proving a state-law violation. The court reserved the question whether a state *criminal* violation might be needed, and it declared that "mere violation of a gratuity statute...will not suffice." *Id.*

The court apparently saw no alternative to its position other than to afford courts and prosecutors the power to devise "an ethical regime for state employees." *Id.* Judge Higginbotham's opinion for the majority noted that although the honest-services statute reestablished the "intangible rights" doctrine that this Court had disavowed in *McNally v. United States*, 483 U.S. 350 (1987), the statute could not be read simply to approve the law that existed prior to *McNally*. This law varied greatly from circuit to circuit and "was not a unified set of rules." *Brumley*, 116 F.3d at 733.

The Third Circuit apparently has approved either the *Brumley* standard or a close relative. In *United States v. Murphy*, 323 F.3d 102, 116 (3d Cir. 2003), it

said, "We...endorse...the decisions of other Courts of Appeals that have...required a state law limiting principle for honest-services fraud." Yet the court said at the same time, "[The defendant] urges us to address [an issue previously reserved]: Whether a violation of a state-law created fiduciary duty is *required* to sustain an honest-services fraud conviction.... [W]e do not think that this case requires us to resolve that question." *Id.* at 117. The court's second statement, viewed in context, appeared to reserve only the question whether a clearly established fiduciary duty established by *federal* law, like one established by state law, could serve as the predicate for an honest-services conviction. The Third Circuit did accept the Fifth Circuit's view that an honest-services conviction must rest on the violation of a duty imposed by a law other than the mail fraud statute itself.

B. One Path to Conviction but not the Only Path

In *United States v. Martin*, 195 F.3d 961, 976 (7th Cir. 1999), the Seventh Circuit rejected *Brumley*'s requirement of a state law violation, but the court did so "without prejudice to reexamining [its anti-*Brumley* position]...should a full argument be mounted against it in a future case." Judge Posner's opinion for the court observed that tying the concept of honest-services fraud to state law might "allay the persistent concerns about the breadth and vagueness of the statute" but that "a uniform albeit judge-made concept of fiduciary duty might do the trick as well or better." *Id.* In later cases, the Seventh Circuit has rejected both of the paths marked by Judge Posner.

In *United States v. Segal*, 495 F.3d 826, 835 (7th Cir. 2007), the Seventh Circuit upheld jury instructions that, in its view, "fairly informed the jury that state law was to be used...to determine the nature of the defendant's legal and fiduciary duties."[3] Shortly thereafter, however, in *United States v. Warner*, 498 F.3d 666, 698 (7th Cir. 2007), the court held that the jury was not required "to find a violation of a specific state law in order to convict."[4]

Moreover, in *United States v. Sorich*, 523 F.3d 702 (7th Cir. 2008), the Seventh Circuit held that the violation of a civil consent decree forbidding patronage hiring could serve as the predicate for an honest-services conviction. It declared, "[W]e have

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[3] I was one of the defendant's counsel in *Segal*. In this case, the district court devoted fifteen pages of its jury instructions to describing Illinois insurance regulations, and it told the jury to convict if the Government established any part of the fraudulent scheme it alleged (a scheme that allegedly extended over a twelve-year period). One of the Government's claims was simply that the defendant had sold insurance at a discount in violation of a non-criminal state regulation. *See* Brief of the Appellants at 14, 39, & 41-42, *United States v. Segal*, 495 F.3d 826 (7th Cir. July 21, 2006) (No. 05-4601).

[4] The indictment in *Warner* nevertheless alleged that the defendants, one of whom was former Illinois Governor George Ryan, had violated duties imposed by state law. "Five pages of the 91-page Ryan indictment are devoted to setting forth the 'Laws, Duties, Policies and Procedures Applicable to' each of the defendants. None of the laws listed in this section are federal laws. They include provisions of the Illinois State Constitution, state criminal laws, non-criminal state regulations, a policy memorandum of the Illinois Secretary of State's office, and George Ryan's announced personal policy of not accepting gifts worth more than $50." Albert Alschuler, *The Mail Fraud and RICO Racket: Thoughts on the Trial of George Ryan*, 9 Green Bag 2d 113, 115 (2006).

never held that only state law can supply a fiduciary duty between public official and public or between employee and employer in honest services cases.... Indeed, our case law...shows that other sources can create a fiduciary obligation." *Id.* at 712 (citing *inter alia* a case that treated an employee handbook as creating fiduciary duties). The court added, "It may well be that merely by virtue of being public officials the defendants owed the public a fiduciary duty to discharge their offices in the public's best interest." *Id.*

The Seventh Circuit thus regards the violation of a state law, a federal law, a civil consent decree, or the policies of an employee handbook as a predicate for an honest services conviction, and when the Government can establish none of these things, the court has indicated that any departure from unwavering service to the public may be enough. In his dissent from the denial of certiorari in *Sorich*, Justice Scalia noted the implications of such a broad reading of the honest-services statute.[5]

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[5] Justice Scalia observed:

> If the "honest services" theory...is taken seriously and carried to its logical conclusion, presumably the statute...renders criminal a state legislator's decision to vote for a bill because he expects it will curry favor with a small minority essential to his reelection; a mayor's attempt to use the prestige of his office to obtain a restaurant table without a reservation; a public employee's recommendation of his incompetent friend for a public contract; and any self-dealing by a corporate officer. Indeed, it would seemingly cover a salaried employee's phoning in sick to go to a ball game.

Sorich v. United States, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari). *See also* Dan Slater, *From Coaches to Church Officials, An Honesty Law Gets a Workout*,

The Seventh Circuit's view that a state law violation is sufficient but unnecessary is shared by other Courts of Appeals. *See, e.g., United States v. Sawyer*, 239 F.3d 31 (1st Cir. 2001) (declaring that a violation of the Massachusetts gratuity statute "was properly charged as a predicate for honest-services mail fraud" but that "establishing honest-services mail fraud...does not require proof of a violation of any state law"); *United States v. Grubb*, 11 F.3d 426, 433 (4th Cir. 1993) (holding that evidence of the defendant's violation of the West Virginia Code of Judicial Conduct was properly received); *United States v. Bryan,* 58 F.3d 933, 940-41 (4th Cir. 1995) (holding that no state law violation is required); *cf. United States v. Jennings*, 487 F.3d 564, 577-78 (8th Cir. 2007) (holding that "a violation of a state disclosure statute is evidence of a public official's intent to defraud the state's citizens of their right to his honest services" while declining to decide whether proof of a state law violation is required).

C. Irrelevant

In the case before this Court, the Ninth Circuit held that the "duty of honesty [of public officials] is uniform rather than variable by state" and that, at least for public officials, "'state law is irrelevant in determining whether a certain course of conduct is violative of the mail fraud statute.'" *United States v. Weyhrauch,* 548 F.3d 1237, 1245 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (June 29, 2009) (No. 08-1196) (quoting *United States v. Louderman*, 576 F.3d

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Wall St. J., Feb. 5, 2009, at A14 (reporting a federal investigation of whether Cardinal Roger Mahoney violated the honest-services statute by concealing sexual misconduct by priests).

1383, 1387 (9th Cir. 1978)).[6] The court observed, "[C]onditioning mail fraud convictions on state law means that conduct in one state might violate the mail fraud statute, whereas identical conduct in a neighboring state would not. Congress has given no indication it intended the criminality of official conduct under federal law to depend on geography." *Id.*[7]

The Ninth Circuit's view that the honest-services statute establishes a uniform national standard is

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[6] Petitioner urges the Court to reject this holding of the Court of Appeals, and it is not clear that the Government endorses it. One paragraph of the Government's brief in opposition to the grant of certiorari does appear to support the view that "state law is irrelevant":

> Nor is there any evidence that Congress intended the uniform federal honest-services prohibition to turn on separate state-law requirements, with the consequence that "conduct in one state might violate the mail fraud statute, whereas identical conduct in another state would not."... Congress proscribed schemes to deprive others of "*the* intangible right to honest services,"...not a multiplicity of rights.

Brief for the United States in Opposition at 8, *Weyhrauch v. United States* (U.S. 08-1196). The remainder of the brief, however, opposes only "a state-law limiting principle," suggesting that the Government may favor the "heads I win, tails you lose" position of the Seventh Circuit and other courts.

This amicus brief urges the Court to approve the Ninth Circuit ruling that the term "honest services" has a uniform national meaning but to reject the broad standard of liability the Ninth Circuit announced.

[7] Surprisingly, the court indicated that it might still allow the guilt of federal defendants other than public officials to turn on geography. "[W]e express no opinion on the role of state law in honest-services fraud prosecutions in the *private* context." *Weyhrauch*, 548 F.3d at 1245 n.5.

shared by the Sixth and Eleventh Circuits. *See United States v. Frost*, 125 F.3d 346, 366 (6th Cir. 1997) ("Federal law governs the existence of fiduciary duty under the mail fraud statute."); *United States v. deVegter*, 198 F.3d 1324, 1329 (11th Cir. 1999) ("The nature and interpretation of the duty owed [under the honest-services statute] is a question of federal law.").

The Second Circuit apparently favors a uniform national standard as well. Formally addressing only the duties of private individuals and not public officials, it declared in *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc), that honest-services fraud consists only of bribes, kickbacks, and undisclosed self-dealing that risks economic harm.[8] The court concluded that the honest-services statute

> prohibits a scheme or artifice to use the mails or wires to enable an officer or employee of a private entity (or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers) purporting to

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[8] Just as the Ninth Circuit limited its ruling in this case to public officials, the Second Circuit limited its ruling in *Rybicki* to private defendants. Neither court suggested any reason why the principles it articulated should not apply to all defendants. The Second Circuit wrote, "The meaning of the phrase 'scheme or artifice to defraud' with respect to public corruption cases is not at issue in the matter before us, and, although we have been given no reason to doubt that it is susceptible to a similar mode of analysis, we do not consider it." 354 F.3d at 138-39. *See United States v. Bruno*, No. 09-CR-29, 2009 U.S. Dist. LEXIS 74278 at *5 (N.D.N.Y. 2009) ("The Second Circuit has categorized honest-services fraud cases as either 'bribery' or 'self-dealing.'... While the Second Circuit has not definitively said that this categorization applies to public officials, it has clearly intimated as much.").

> act for and in the interest of his or her employer (or of the person to whom the duty of loyalty is owed) secretly to act in his or her or the defendant's own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer.

Id. at 127.

Nothing in the court's formulation looks to state law, and in the years since *Rybicki*, neither trial nor appellate courts in the Second Circuit have referred to state law in assessing the duties of honest-services defendants. *See, e.g., United States v. Ganim*, 510 F.3d 134, 147-50 (2d Cir. 2007) (Sotomayor, J.) (examining only federal precedents in evaluating the claim that an honest-services defendant's conduct did not amount to quid pro quo bribery, apparently because both parties agreed that "honest services" bribery did not differ from bribery under other federal statutes).

If honest-services fraud were limited to cases of quid pro quo bribes and kickbacks as this brief will propose, the choice between state and federal standards would diminish in importance. The statute would then apply only to plainly culpable conduct that every state and the federal government presumably condemn.

II. TWO CLEAR STATEMENT PRINCIPLES

Despite the remarkable disarray of the rulings of the Courts of Appeals, two decisions of this Court make the answer to the question it posed in its order granting certiorari[9] extraordinary clear. The mean-

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[9] "Whether, to convict a state official for depriving the public of its right to the defendant's honest services through the

ing of the term "honest services" cannot vary from state to state. This term must be read to establish a uniform national standard.

A. *Jerome v. United States*

On July 14, 1941, Jerome Parker Jerome entered a bank in Burlington, Vermont and borrowed $500. A jury later determined that he had forged the signature of a purported co-signer. A Vermont statute made his crime a felony, but Jerome was not charged with violating this statute. Instead, he was prosecuted for and convicted of violating Section 2(a) of the Federal Bank Robbery Act, which read, "Whoever shall enter...any bank...with intent to commit in such bank...any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both." 48 Stat. 783 (1934); 50 Stat. 749 (1937).[10]

This Court held that the word "felony" in Section 2(a) did not incorporate state law, and it reversed Jerome's conviction. *Jerome v. United States*, 318 U.S. 101, 104 (1943). The Court said:

> [W]e must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on

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nondisclosure of material information, in violation of the mail-fraud statute..., the government must prove that the defendant violated a disclosure duty imposed by state law." *Weyhrauch v. United States*, 129 S. Ct. 2863 (2009).

[10] The facts of Jerome's case are reported in *United States v. Jerome*, 130 F.2d 514 (1942), *rev'd*, 318 U.S. 101 (1943). The defendant's symmetrical name appears in *Jerome v. United States*, 317 U.S. 606 (1943) (granting the defendant's pro se petition for certiorari).

> state law. That assumption is based on the fact that the application of federal legislation is nationwide...and at times on the fact that the federal program would be impaired if state law were to control.... When it comes to federal criminal laws such as the present one, there is a consideration in addition to the desirability of uniformity of application which supports the present principle.

Id.

The Court then noted that "there is no common law offense against the United States," that "the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress," and that the Double Jeopardy Clause does not bar successive prosecutions by state and federal governments for a single criminal act. For all of these reasons, it declared that "where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offense beyond the clear requirements of the terms of the statute." *Id.* at 104-05.

This Court has relied on *Jerome* in holding that the term "domicile" in the Indian Child Welfare Act must have a uniform national meaning, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43-46 (1989); that the meaning of the term "political subdivision" in the National Labor Relations Act is determined by federal rather than state law, *NLRB v. Natural Gas Utility Dist.*, 402 U.S. 600, 602-03 (1971); and that federal rather than state law determines the meaning of the word "employee" in the National Labor Relations Act, *NLRB v. Hearst Publs.*, 322 U.S. 111, 123-24 (1944).

Moreover, this Court has given special weight to *Jerome*'s clear-statement principle in criminal cases. Just as this Court held in *Jerome* that courts should not look to state law to define the word "felony" in the Bank Robbery Act, it held in *United States v. Nardello*, 393 U.S. 286, 293-94 (1969), that state law does not determine the meaning of the word "extortion" in the Travel Act. It held in *United States v. Turley*, 352 U.S. 407, 410-11 (1957), that federal rather than state law determines whether an automobile has been "stolen" within the meaning of a statute forbidding the transportation of a stolen automobile across a state line. And it held in *Taylor v. United States*, 495 U.S. 575, 590-92 (1990), that state law does not determine the meaning of the word "burglary" in the enhanced-punishment provision of a federal gun law.

The mail fraud statute contains no clear statement (or even a hint) that state law determines whether a federal defendant has failed to provide "honest services." When the Fifth Circuit held in *Brumley* that "honest services" means "services owed under state law," 116 F.3d at 734, it failed to cite *Jerome* or to explain how its position could be reconciled with the clear-statement principle of that decision. Indeed, *none* of the dozens of appellate and district court decisions that have looked to state law to establish the central element of honest-services fraud have cited *Jerome* or explained how their position could be reconciled with it. In fact, no reconciliation is possible.

B. *Cleveland v. United States*

To violate the mail fraud statute, a person must scheme to deprive another of either property or the intangible right to honest services. *See* 18 U.S.C.

§§1341 & 1346; *McNally v. United States*, 483 U.S. 350 (1987). In *Cleveland v. United States*, 531 U.S. 12 (2000), this Court held that obtaining a state license by fraud does not deprive a state of property.

Cleveland articulated a uniform national standard. If the legislature of State A had declared that unissued licenses were property while the legislature of State B had said that they were not, the variation would not have mattered. Similarly, *Carpenter v. United States*, 484 U.S. 19 (1987), held that confidential information constitutes property throughout the United States and can be the subject of federal mail fraud. There is no greater reason to use state law to define the term "honest services" in the mail fraud statute than there is to use this law to define "property."

The Court's ruling in *Cleveland* did not rest entirely on an abstract consideration of the nature of property:

> We reject the Government's theories of property rights not simply because they stray from traditional concepts of property. We resist the Government's reading of §1341 as well because it invites us to approve a sweeping expansion of federal jurisdiction in the absence of a clear statement by Congress. Equating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities. We note in this regard that Louisiana's video poker statute typically and unambiguously imposes criminal penalties for making false statements on license applications.... As we reiterated last Term, "unless Congress conveys its purpose clearly, it

> will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Jones v. United States*, 529 U.S. 848, 858 (2000) (quoting *United States v. Bass*, 404 U.S. 336, 340 (1971)).

Cleveland, 531 U.S. at 24-25.

Reading the mail fraud statute to federalize every state's regulation of its public officials and every state's law of private fiduciary obligation would alter the federal-state balance far more than simply providing a duplicative federal sanction for the fraudulent acquisition of state licenses. The twenty-eight words of 18 U.S.C. §1346 provide no clear statement—indeed they provide no indication at all—that Congress favored this breathtaking expansion of federal criminal jurisdiction.

III. STANDING FEDERALISM ON ITS HEAD

The district court in this case endorsed the Fifth Circuit's view that establishing a deprivation of the intangible right to honest services requires proof of a state-law violation. *United States v. Kott*, No. 07 CR 56, 2007 U.S. Dist. LEXIS 66125 at *11-18 (D. Alaska Sept. 4, 2007), *rev'd*, 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (June 29, 2009) (No. 08-1196). Finding no provision in the Alaska Code of Legislative Conduct requiring a state legislator to disclose his negotiation for employment with a firm interested in state tax legislation, the court concluded that the government could not ground a charge of honest-services fraud on the failure of the defendant, a member of the Alaska House of Representatives, to disclose his negotiation for employment with an oil field services company. *Id.* at *3-10, 18.

Although the Alaska Code contained no provision requiring the defendant to disclose his negotiation for employment, it does contain a provision requiring a legislator to disclose membership on a corporate board. Alaska Stat. §24.60.030(f) (2008) ("A legislator...who serves on a board of an organization...shall disclose the board membership to the committee."). The code provides no judicial remedy for a violation of this provision or for a violation of any of its provisions. Instead, when someone files a complaint, Alaska's Select Committee on Legislative Ethics investigates it, initially on a confidential basis. *Id.* §24.60.170. Then, "[i]f the committee investigation determines that a probable violation of this chapter exists that may be corrected by the action of the subject of the complaint and that does not warrant sanctions other than correction, the committee may issue an opinion recommending corrective action." *Id.* §24.60.170(g). The committee itself may not impose a more severe sanction, but it may advise a branch of the legislature to do so. Potential sanctions include private reprimand, public reprimand, censure, "imposition of a civil penalty of not more than $5000 for each offense or twice the amount improperly gained, whichever is greater," removal from a leadership position or a committee membership, and expulsion. *Id.* §24.60.178.

Although the district court apparently would have upheld an honest services prosecution grounded on the failure of an Alaska legislator to disclose his membership on a corporate board, states other than Alaska do not require legislators to disclose every board membership. *See, e.g.*, 5 ILCS 420/4A-102 (2009). A legislator in one of these states who failed to disclose a board membership would be guilty of neither a state nor a federal offense. Moreover,

Alaska itself might punish a legislator's nondisclosure only by recommending correction or by issuing a reprimand. Nevertheless, if the government could establish the other elements of mail fraud (which *Weyhrauch* indicates are mailing, materiality, and fraudulent intent), the district court apparently would convict the Alaska legislator of scheming to deprive the public of the intangible right to his honest services, a federal crime carrying a maximum penalty of twenty years. *See* 18 U.S.C. §1341; Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 §903, 116 Stat. 745, 800 (2002) (increasing the maximum penalty for mail and wire fraud from five to twenty years). Mail fraud, moreover, is a predicate offense under RICO, 18 U.S.C. §1961(1), and the money laundering statute, 18 U.S.C. §1956(c)(7)(A).

Courts have argued that reading the term "honest services" to incorporate state standards promotes federalism. The Fifth Circuit referred in *Brumley* to "[t]he tension inherent in federal criminalization of conduct by state officials innocent under state law," 116 F.3d at 735, and it said, "We will not lightly infer that Congress intended to leave to courts and prosecutors, in the first instance, the power to define the range and quality of services a state employer may choose to demand of its employees." *Id.* at 734. As the next section of this brief will explain, the court seriously misconceived its options.

In fact, using state law to define the federal right to honest services not only causes federal law to vary from state to state but also frustrates state interests. Every state's regulatory policy is a blend of prohibition, punishment, and forbearance. Federalizing a state's substantive regulations without its accompanying penalty structure and enforcement mechan-

isms diminishes state power. When a federal district court effectively substitutes itself for the Alaska Select Committee on Legislative Ethics, when it effectively tries state officials for regulatory violations and state crimes in the federal courts, and when it punishes these state violations much more severely than the state legislature and state administrative authorities consider appropriate, it deprives the state of the ability to govern itself.

IV. COMPARED TO WHAT? THE APPROPRIATE FEDERAL STANDARD

The federal courts that have looked to state law to define the intangible right to honest services have bemoaned what they regard as the only alternative to their approach—empowering federal judges and prosecutors to devise "an ethical regime for state employees." *Brumley*, 116 F.3d at 734. They have feared turning honest-services fraud into "a federal common-law crime, a beastie that many decisions say cannot exist." *United States v. Bloom*, 149 F.3d 649, 654 (7th Cir. 1998) (Easterbrook, J.); *see also Martin*, 195 F.3d at 966 (Posner, J.) ("The fear that motivated the *Brumley* decision is that if federal courts are free to devise fiduciary duties the breach of which violates the mail fraud statute, the result will be the creation in effect of a class of federal common law crimes,...something federal courts have steadily refused to do."). A chancellor's-foot concept of honest-services fraud would indeed be even more terrifying than converting state regulatory violations into twenty-year federal felonies.

There are, however, better options. An appropriate standard of honest-services fraud (i) would be uniform throughout the United States; (ii) would be

simple and clear; (iii) would be limited to culpable conduct of the sort that every state and the federal government presumably condemn; and (iv) would accomplish the only goal that Congress clearly manifested when it enacted 18 U.S.C. §1346—that of "overruling" *McNally v. United States*, 483 U.S. 350 (1987). *McNally* held that federal mail fraud encompasses only schemes to deprive people of property.

This section evaluates three potential standards. In this case, the Ninth Circuit described "two core categories of conduct" that it said were "sufficient to support an honest services conviction." They were "(1) taking a bribe or otherwise being paid for a decision while purporting to be exercising independent discretion and (2) nondisclosure of material information." *Weyhrauch*, 548 F.3d at 1247.

In *Rybicki*, the Second Circuit also described two core categories of honest-services fraud, but its categories were different. They were "cases involving bribes or kickbacks, and cases involving self-dealing." 354 F.3d at 139.

Judge Easterbrook's opinion in *Thompson*, 484 F.3d at 883, spoke of a need to reduce the vagueness of his court's current standard. He then declared, "The history of honest-services prosecutions is one in which the 'private gain' comes from third parties who suborn the employee with side payments, often derived via kickbacks skimmed from a public contract. Treating §1346 as limited to such situations is consistent with its language." *Id.* at 884.[11]

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[11] Shortly after the decision in *Thompson*, the Seventh Circuit took the law of federal mail fraud in a very different direction from the one to which Judge Easterbrook had pointed. See the descriptions of *Segal*, *Warner*, and *Sorich* at pages 6-7 of this brief.

Weyhrauch, *Rybicki*, and *Thompson* agree that improper side payments—bribes and kickbacks—are at the core of honest-services fraud. *Thompson*, moreover, sees nothing else at the core. Although *Weyhrauch* and *Rybicki* perceive a second core category, they differ on what it is.

A. Nondisclosure of Material Information

When regulators attempt to devise an ethical code for legislators, they quickly discover that they cannot block every way in which people may attempt to curry political favor. Prohibiting bribes, kickbacks, and non-trivial gifts to legislators is a good start, but then the questions grow difficult. When a legislator serves part-time, as Alaska legislators do, who may patronize his law firm or insurance agency? Who may offer employment to his spouse or adult children? Who may give his daughter a very nice wedding present?

A *New York Times* story indicates how people currying favor are likely to outrun any prohibition the regulators might plausibly enact. It reports that several major defense contractors have made large contributions to the Johnstown Symphony, an orchestra in Western Pennsylvania. Their gifts might have been prompted by the fact that this orchestra is the favorite charity of the wife of a powerful member of Congress. *Keeping Lawmakers Happy Through Gifts to Pet Charities*, N.Y. Times, Oct. 19, 2008, at A1.

Whether the Pennsylvania Congressman votes aye or nay on, say, a health care measure, he is likely to benefit someone who once made a contribution to the Johnstown Symphony. Presumably the Ninth Circuit would not convict the Congressman of federal mail fraud simply because he failed to disclose that his

vote would benefit a contributor to his wife's favorite charity, but one can only guess how far short of absurdity the court would draw its line.

The word "material" does not help.[12] Once, when fraud consisted of obtaining property by lying, a lie was considered material if it was likely to influence a person to part with his property. *See* Restatement of Torts Second §583; 1 Marshall Shapo, The Law of Products Liability §2.02[4], at 1013 (4th ed. 2001) ("Materiality often merges with the causation issue to the point of practical equivalence."). When the public is deprived of the intangible right to honest services, however, it takes no affirmative action. A "material" nondisclosure need not cause anything. It may be simply the nondisclosure of something one would like to know.

The words "intent to defraud" do not help either, for if fraud consists simply of nondisclosure, an intent not to disclose appears to satisfy this mental-state requirement. *See United States v. Kincaid-Chauncey*, 556 F.3d 923, 950 (9th Cir. 2009) (Berzon, J., concurring).

Regulators must draw difficult lines, and legislatures can draw sharper lines than courts can. The Alaska Code of Legislative Conduct, for example, declares that legislators and members of their immediate families may not be parties to or have interests in state contracts or leases, but it then establishes several exceptions, including an exception when "the total annual amount of the contract or lease is $5000 or less." Alaska Stat. §24.60.040 (2008).

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[12] Materiality is an invariable element of federal mail fraud. *See Neder v. United States*, 527 U.S. 1, 20-25 (1999).

The Alaska Code also declares that "a legislator may not vote on a question if the legislator has an equity or ownership interest in a business, investment, real property, lease, or other enterprise if the interest is substantial and the effect on that interest of the action to be voted on is greater than the effect on a substantial class of persons to which the legislator belongs as a member of a profession, occupation, industry, or region." *Id.* §24.60.030(g). The Code, however, does not preclude voting when a member of the legislator's family has a substantial interest in a business that might be affected by his vote. Would the Ninth Circuit convict a legislator of mail fraud if he voted without disclosing a family member's substantial interest? If so, how would the court define "substantial"? *Cf.* Cal. Gov't Code §87103(a) (declaring that a public official has a financial interest in a decision if the decision will affect a business entity in which he has a direct or indirect investment worth $2,000 or more). How would the court define family? The D.C. Code includes in the term "immediate family" all parents, children, and siblings of the legislator and their spouses as well. D.C. Code §1-1106.01(i)(5). The Alaska Code, however, when it restricts family members at all, omits the spouses of parents, children, and siblings. Moreover, it includes the parents, children, and siblings themselves only when they reside with the legislator, are financially dependent on him, or share a substantial financial interest with him. Alaska Stat. §24.60.990(a)(6). The California Code omits parents and siblings altogether. Cal. Gov't Code §82029. And how prominent a disclosure would the Ninth Circuit require?

State legislatures should be allowed to draw reasonable lines in the area of legislative ethics without

being overridden by a judicially improvised law of honest-services mail fraud. When, in this case, the Ninth Circuit mandated a disclosure that the detailed Alaska Code of Legislative Conduct did not require, it revealed why common law crimes are disfavored and validated the worst fears of the courts that have endorsed a state-law limiting principle. Moreover, as Judge Berzon noted in an opinion critical of her court's decision in this case, "The conflict of interest theory, unhinged from an external disclosure standard, places too potent a tool in the hands of zealous prosecutors who may be guided by their own political motivations...[and who] might also feel political pressure to pursue certain state or local officials." *United States v. Kincaid-Chauncey*, 556 F.3d 923, 949-50 (9th Cir. 2009) (Berzon, J., concurring).

The *Weyhrauch* opinion offered virtually no support for its claim that the nondisclosure of material information was a core category of honest-services fraud. Declaring that its pre-*McNally* cases supported this claim, the opinion invited readers to see *United States v. Bohonos*, 628 F.2d 1167, 1171 (9th Cir. 1980), which the court said cited relevant cases. *Weyhrauch*, 548 F.3d at 1247. In none of the pre-*McNally* cases cited by *Bohonos*, however, were defendants convicted simply because they failed to disclose conflicts of interest.

Bohonos noted, "Most often [intangible rights] cases have involved bribery of public officials." 628 F.2d at 1171. Then it made a statement that apparently misled the *Weyhrauch* court: "A public official's nondisclosure of material information has also been held to satisfy the *fraud element*." *Id.* (emphasis added). Following this statement, *Bohonos*

cited only a case of self-dealing, *United States v. Bush*, 522 F.2d 641 (7th Cir. 1975); a case in which the defendants had affirmatively "misrepresented themselves over the telephone as postal or phone company employees in order to gather confidential information," *United States v. Louderman*, 576 F.2d 1383 (9th Cir. 1978); three cases in which the defendants had accepted kickbacks, *United States v. Hassenstab*, 575 F.2d 1035 (2d Cir. 1978); *United States v. Bryza*, 522 F.2d 414 (7th Cir. 1975); *United States v. George*, 477 F.2d 508 (7th Cir. 1973); and one strange case in which the defendant had persuaded someone to steal maps, *Abbott v. United States*, 239 F.2d 310 (5th Cir. 1956). The defendants in these cases may indeed have failed to disclose material information (for example, that they were taking kickbacks), but the cases did not suggest that every undisclosed conflict would support a conviction.

Justice Stevens's dissent in *McNally* described the pre-*McNally* intangible rights doctrine in detail. 483 U.S. at 362-65. In all of the honest-services cases that he described, the defendants had received bribes or kickbacks. Justice Stevens listed no cases of self-dealing and no cases of nondisclosure of material information.[13] Nothing in the language or history of the honest-services statute indicates that the nondisclosure of material information was a core category of honest-services fraud or indeed a category of honest-services fraud at all.

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[13] Justice Stevens did discuss intangible rights other than the right to honest services, particularly the right to an honest election. Congress did not resurrect these rights in 18 U.S.C. §1346.

B. Self-Dealing

Under the law of trusts, "transactions involving trust property entered into by a trustee for the trustee's own personal account [are] voidable without further proof." Unif. Trust Code §802 comment. An Ohio court explained in 1875 that a trustee's self-dealing is prohibited "not because there *is* fraud, but because there *may be* fraud." *Piatt v. Longworth's Devisees*, 27 Ohio St. 159, 195-96 (1875). The prohibition of self-dealing is weaker in corporation law, for this law allows non-conflicted directors to approve a transaction with a conflicted director. The "sole interest rule" remains strong, however, in the law of agency. *See* John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 958-63 (2005).

Prohibiting self-dealing by trustees can disadvantage beneficiaries. For example, when the owner of a farm died fifteen days before the planting season was to begin, her executor and trustee, Colbrook, leased and worked the farm himself. Although it was unlikely that Colbrook could have found another tenant, an Illinois court awarded the profits he earned to the trust. Neither the trustee's "good faith and honesty," nor his disclosure of the transaction, nor the absence of financial harm mattered. *In re Will of Gleeson*, 124 N.E.2d 624 (Ill. App. Ct. 1955).

America's preeminent trusts scholar would abandon the prohibition of self-dealing and "allow a conflicted trustee to defend on the ground that the particular transaction was prudently undertaken in the best interest of the beneficiaries." Langbein, *supra*, at 989. Whether or not this scholar is persuasive, Colbrook's breach of fiduciary duty by

renting a farm to himself does not warrant a conviction for federal mail fraud.

Although the Second Circuit described self-dealing as an established area of pre-*McNally* honest-services fraud, it would not permit Colbrook's conviction. It wrote, "In the self-dealing cases, the defendant typically causes his or her employer to do business with a corporation or other enterprise in which the defendant has a *secret* interest, undisclosed to his employer." *Rybicki*, 354 F 3d at 140 (emphasis added). The criminalization of self-dealing becomes more plausible when it is limited to cases of *undisclosed* self-dealing.

The Second Circuit failed to demonstrate, however, that even undisclosed self-dealing was a well-established form of honest-services fraud before *McNally*. It cited only six pre-*McNally* cases from throughout America, and in three of them, the defendants' convictions were reversed. *Id.* at 140-41. One reversal came because the defendant's mailing was inadequate. In the other two cases, courts reversed because the government failed to establish an economic detriment to the defendants' employers. In one of these cases, the Sixth Circuit declared, "[I]t must...be concluded that the failure to make...disclosure [of the defendant's ownership interest] did not clothe this otherwise fair course of dealing with intentional fraud, dishonest in purpose, and inconsistent with moral uprightness." *Epstein v. United States*, 174 F.2d 754, 768 (6th Cir. 1949). In at least two of the three cases in which courts affirmed the defendants' convictions, moreover, economic harm to the defendants' employers was apparent. *See United States v. Barta*, 635 F.2d 999 (2d Cir. 1980); *United States v. McCracken*, 581 F.2d

719 (8th Cir. 1978). The Second Circuit concluded, "In the self-dealing context, though not in the bribery context, the defendant's behavior must...cause, or at least be capable of causing, some detriment—perhaps some economic or pecuniary detriment—to the employer." *Rybicki*, 354 F.3d at 141.

When a prohibition of self-dealing is limited in the way the Second Circuit limits it, the prohibition reaches only culpable conduct, but there is neither an evident federal interest in punishing this conduct nor any reason to believe that Congress intended to punish it. Treating self-dealing as honest-services fraud requires epicycles that are not needed in other honest-services cases—notably, a requirement of proof of economic harm that, as the Second Circuit noted, has no place in cases of bribes and kickbacks. Although the *Rybicki* standard is far closer to the mark than the *Weyhrauch* standard, a better standard would leave the regulation of self-dealing to the states.

C. Quid Pro Quo Bribes and Kickbacks

Weyhrauch, *Rybicki*, and *Thompson* treat undisclosed side payments as the heart of honest-services fraud, and they are not alone. *See, e.g.*, *deVegter*, 198 F.3d at 1327-28 ("[T]he paradigm case of honest-services fraud is the bribery of a public official."); *Sorich*, 523 F.3d at 707 ("[I]n most honest services cases, the defendant violates a fiduciary duty in return for cash kickbacks, bribes, or other payments."). Treating only schemes to obtain quid pro quo bribes or kickbacks as honest-services fraud would satisfy the four criteria noted earlier. It would establish a uniform national standard, define honest services with clarity, reach only seriously culpable

conduct, and accomplish Congress's goal of "overruling" *McNally*.

The proposed standard would resolve the three-way conflict among the circuits over the appropriate role of state law by establishing a uniform national standard. It would not, however, empower judges and prosecutors to devise an ethical regime for state employees and would not punish borderline conduct that some states might choose not to criminalize.

This standard would effectively resolve two other circuit conflicts as well. First, it would obviate the need for a distinction between public-sector and private-sector cases—a distinction that only some circuits have found appropriate.[14] Because accepting bribes and kickbacks constitutes hard-core corruption whether the recipients are public officials or private fiduciaries, there would be no need to distinguish between these classes of defendants.

Second, this standard would effectively resolve a circuit conflict over whether the law of honest-services fraud should focus on gain to the defendant or economic harm to the victim—a conflict this Court may address in *Black v. United States* (No. 08-876). Although the Seventh Circuit requires "misuse of office...for personal gain" in every case, *see Bloom*, 149 F.3d at 655, the First, Second, Fourth, Sixth, Eighth, and Eleventh Circuits require intended or foreseeable harm, at least in some cases. *See United*

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[14] The Seventh Circuit, for example, has never distinguished public officials from private fiduciaries. The Eighth Circuit, however, has required proof of intended or actual "harm to the victims' tangible interests" in private-sector but not public-sector cases. *United States v. Jain*, 93 F.3d 436, 441-42 (8th Cir. 1996).

States v. Martin, 228 F.3d 1, 17-18 (1st Cir. 2000) (requiring an independent business risk or reasonably foreseeable economic harm); *United States v. Rybicki*, 354 F.3d 124, 141 (2d Cir. 2003) (requiring "some detriment—perhaps some economic or pecuniary detriment" in self-dealing cases but not other cases); *United States v. Vineyard*, 226 F.3d 320, 326 (4th Cir. 2001) (requiring foreseeable economic harm); *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997) (same); *United States v. Jain*, 93 F.3d 436, 441-42 (8th Cir. 1996) (requiring "harm to...tangible interests" in private-sector but not public-sector cases); *United States v. deVegter*, 198 F.3d 1324, 1328-29 (11th Cir. 1999) (requiring foreseeable economic harm).

Schemes to obtain bribes and kickbacks are by definition schemes to obtain personal gain, and nothing more should be necessary. By failing to disaggregate the various forms of misconduct they have swept into the honest-services net, the Seventh Circuit and most other courts have missed the mark. The Second Circuit, however, did disaggregate. *Rybicki* recognized that a requirement of foreseeable economic loss makes sense in self-dealing cases. Colbrook, the trustee who rented a farm to himself rather than allow it to lie fallow, sought his own gain as well as a benefit to the trust, and a requirement of foreseeable economic loss seems necessary to block his conviction. As *Rybicki* also recognized, however, a requirement of economic loss makes no sense in bribe and kickback cases.

Indeed, the very point of the honest-services statute was to eliminate any requirement of economic loss in these cases. A paradigmatic pre-*McNally* case of honest-services fraud was that of Illinois Governor

Otto Kerner, who allegedly obtained racetrack stock at far less than its value in exchange for approving additional racing days. These extra racing days did not cost the taxpayers of Illinois money. To the contrary, they brought additional revenue into the state treasury. Kerner argued that he "could not have violated the mail fraud statute because the indictment failed to charge that [he] had defrauded State of Illinois, its citizens, or the racing associations out of something of definable value, money or property." *United States v. Isaacs*, 493 F.2d 1124, 1149 (7th Cir. 1974). Kerner lost his case, but the defendant in *McNally* made the same argument and won. The Congress of the United States did not like it.

Representative Conyers, the sponsor of the honest-services statute in the House, declared, "This amendment is intended merely to overturn the *McNally* decision. No other change in the law is intended." He explained what overturning *McNally* meant: "Thus, it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property." 134 Cong. Rec. H11251 (daily ed. Oct. 21, 1988).

A Senate Judiciary Committee report said the same thing:

> This section overturns the decision in *McNally v. United States* in which the Supreme Court held that the mail and wire fraud statutes protect property but not intangible rights. Under the amendment, those statutes will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials.

134 Cong. Rec. S17360-02 (daily ed. Nov. 10, 1988) (Senate Judiciary Committee Report).[15]

The legislative history says only what anyone who read the statute and compared it with *McNally* would realize. Under the statute, a person who has taken a bribe or kickback cannot assert as a defense that his wrongful act caused no economic harm. The deprivation of the fiduciary's honest services is enough. A requirement of tangible loss even in bribe and kickback cases puts back into the mail fraud statute what Congress meant to take out.

Limiting honest-services fraud to cases of bribes and kickbacks would kill several ugly beasts with one stone. Federal trials for state offenses, chancellor's-foot standards, and lengthy prison sentences for regulatory violations would disappear. The proposed standard would make the statute comprehensible by taking seriously what Congress meant to do—overrule *McNally* and no more.

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[15] These sources also declared that the statute would "restore[] the mail fraud provision to where that provision was before the *McNally* decision." 134 Cong. Rec. at H11251. Presumably, however, Congress did not mean to validate every pre-*McNally* decision in every court. Restoring all pre-*McNally* law, for example, would resurrect the Sixth Circuit's judgment that the honest-services doctrine should not apply at all to private individuals. *See United States v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986), *rev'd*, *McNally v. United States*, 483 U.S. 350 (1987). Congress's goal was presumably to restore the pre-*McNally* honest-services doctrine with the same potential for development and clarification it had before the Supreme Court rejected it, not to block this Court from resolving circuit conflicts, reining in outliers, and making the doctrine more coherent.

CONCLUSION

Federal judges have criticized the expansion of federal criminal law. *See, e.g.*, William H. Rehnquist, *Remarks on the Federalization of Criminal Law*, Address Before the American Law Institute (May 11, 1998), *in* 11 Fed. Sentencing Rep. 132 (1998). As Stephen Smith observes, however, "Far from being innocent bystanders in the federalization of crime, federal judges have been all too willing to construe federal crimes expansively." Stephen F. Smith, *Proportionality and Federalization*, 91 Va. L. Rev. 879, 884 (2005). Smith describes federal mail fraud as an "example of courts taking a bad situation created by Congress and making it worse." *Id.* at 923.

This case presents an opportunity to rein in a sprawling statute, not by adding whistles, epicycles, and gimmicks, but by observing long-standing clear-statement principles and by considering carefully what this statute was meant to accomplish. This Court should endorse the sensibly limited *Rybicki* standard of honest-services liability or, even better, should treat only schemes to obtain quid pro quo bribes and kickbacks as honest-services fraud.[16]

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[16] This Court's grant of certiorari poses the issue, roughly, as whether the standard of honest-services fraud should incorporate state law. The Court, however, might invite the parties to submit supplemental briefs on what uniform national standard would be appropriate if the Court were to adopt one. Incorporating state law is only one of several alternatives, and these alternatives cannot be judged effectively in isolation from one another. Sadly, in the absence of some judicial prompting, the adversary system is likely to present only two at a time.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 08-1196

In the Supreme Court of the United States

BRUCE WEYHRAUCH,
Petitioner,

v.

UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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September 21, 2009

BOTH SIDES

QUESTION PRESENTED

Whether, to convict a state official for depriving the public of its right to the defendant's honest services through nondisclosure of material information, in violation of the mail-fraud statute (18 U.S.C. §§ 1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. 18 U.S.C. § 1346 Is Unconstitutionally Vague, As It Fails To Provide Fair Notice Of Its Scope Or Meaning 5

II. 18 U.S.C. § 1346 Unconstitutionally Intrudes Upon State Sovereignty 15

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

City of Chicago v. Morales,
527 U.S. 41 (1999) 5

Cleveland v. United States,
531 U.S. 12 (2000) 17, 22

Crandon v. United States,
494 U.S. 152 (1990) 6

Danforth v. Minnesota,
128 S. Ct. 1029 (2008) 20

Gregory v. Ashcroft,
501 U.S. 452 (1991) 17

McNally v. United States,
483 U.S. 350 (1987) ..... *passim*

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) 19

New York v. United States,
505 U.S. 144 (1992) 15, 21

Printz v. United States,
521 U.S. 898 (1997) 18, 21

Schmuck v. United States,
489 U.S. 705 (1989) 17

Sorich v. United States,
129 S. Ct. 1308 (2009) 4, 8, 9, 15, 19

U.S. Terms Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 18

United States v. Bass,
404 U.S. 336 (1971) 22

United States v. Bloom,
149 F.3d 649 (7th Cir. 1998) 11

United States v. Brown,
459 F.3d 509 (5th Cir. 2007) 14, 15

United States v. Brumley,
116 F.3d 728 (5th Cir. 1997) ..... *passim*

United States v. Cochran,
109 F.3d 660 (10th Cir. 1997) 12

United States v. Diaz,
712 F.2d 36 (2d Cir. 1983) 5

United States v. Frost,
125 F.3d 346 (6th Cir. 1997) 9, 12

United States v. Handakas,
286 F.3d 92 (2d Cir. 2002) 7

United States v. Jain,
93 F.3d 436 (8th Cir. 1996) 12

United States v. Lopez,
514 U.S. 549 (1995) 15, 16

United States v. Margiotta,
688 F.2d 108 (2d Cir. 1982) 3, 10

United States v. Martin,
195 F.3d 961 (7th Cir. 1999) 11–12

United States v. Panarella,
277 F.3d 678 (3d Cir. 2002) 6, 11, 18

United States v. Rybicki,
354 F.3d 124 (2d Cir. 2003) 7, 10, 11, 21, 22

United States v. Santos,
128 S. Ct. 2020 (2008) 6

United States v. Sawyer,
85 F.3d 713 (1st Cir. 1996) 9, 14

United States v. Sorich,
523 F.3d 702 (7th Cir. 2008) 11

United States v. Thompson,
484 F.3d 877 (7th Cir. 2007) 8, 9

United States v. Turner,
465 F.3d 667 (6th Cir. 2006) 22

United States v. Urciuoli,
513 F.3d 290 (1st Cir. 2005) 8, 12

United States v. Welch,
327 F.3d 1081 (10th Cir. 2003) 9, 11

United States v. Williams,
128 S. Ct. 1830 (2008) 5

FEDERAL STATUTES

18 U.S.C. § 1341 ..... 2, 20

18 U.S.C. § 1343 2

18 U.S.C. § 1346 ..... *passim*

STATE STATUTES

Alaska Stat. § 24.60.240 20

N.Y. Pub. Off. Law § 73 13

N.Y. Pub. Off. Law § 73-a 13

N.Y. Pub. Off. Law § 73-a(4) 20

N.Y. Pub. Off. Law § 74 13

N.Y. Pub. Off. Law § 75 13

OTHER AUTHORITIES

George D. Brown, *Should Federalism Shield Corruption? Mail Fraud, State Law and Post-Lopez Analysis*, 82 Cornell L. Rev. 225 (1997) 2, 18

George D. Brown, *New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption?*, 60 Wash. & Lee. L. Rev. 417 (2003) 15–16

The Federalist No. 39 (James Madison) (C. Rossiter ed., 1961) 18

The Federalist No. 45 (James Madison) (C. Rossiter ed. 1961) 16

Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B. C. L. Rev. 435 (1995) 2

Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. Pa. L. Rev. 257 (2005) 20

INTEREST OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE*[1]

Amicus is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

The National Association of Criminal Defense Lawyers (NACDL) was founded in 1958. It has a nationwide membership of 11,000 and an affiliate membership of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates. NACDL files numerous *amicus* briefs each year in this Court and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Recent cases in which NACDL has participated as *amicus curiae* include *Black v. United States*, No. 08-876 (pending); *Montejo v. Louisiana*,

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have either been previously filed with the Clerk of this Court or accompany this brief.

129 S. Ct. 2079 (2009); *Giles v. California*, 128 S. Ct. 2678 (2008); *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008); and *Indiana v. Edwards*, 128 S. Ct. 2379 (2008).

NACDL has an interest in ensuring that federal criminal statutes provide fair notice of what conduct is prohibited and that criminal defendants are not penalized for making legitimate strategic decisions.

SUMMARY OF ARGUMENT

Beginning in the 1970s, enterprising federal prosecutors embarked upon an aggressive campaign to use a dubious interpretation of the federal mail and wire fraud statutes to impose free-ranging ethical obligations upon state and local governmental officials. Originally, the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, were narrowly targeted, vindicating only the government's interest in preventing the use of the federal mail and wire systems "to carry instruments of fraud such as false advertisements of get-rich-quick schemes." *See* George D. Brown, *Should Federalism Shield Corruption? Mail Fraud, State Law and Post-Lopez Analysis*, 82 Cornell L. Rev. 225, 246 (1997) (citing Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B. C. L. Rev. 435, 442 (1995)). Under the government's ever-expansive "honest services" theory, however, the statutes were expanded to cover a wide variety of fiduciary duties as well, including the public servant's ill-defined obligation to respect the "intangible right of the citizenry to good government." *McNally v. United States*, 483 U.S. 350, 356 (1987); *see also United States v. Margiotta*, 688 F.2d

108, 123–126 (2d Cir. 1982). In the face of this extreme misinterpretation, some judges remained cautious, decrying federal prosecution of honest services fraud as "a catch-all political crime which has no use but misuse," invoked only "when a particular corruption, such as extortion, cannot be shown or Congress has not specifically regulated certain conduct." *Margiotta*, 688 F.2d at 144 (Winter, J., concurring in part and dissenting in part).

In 1987, this Court vindicated such skepticism. In *McNally v. United States*, the Court identified two critical constitutional concerns raised by the federal government's attempt to use general fraud statutes to regulate local governmental affairs: the fundamental vagueness of the "ambiguous" honest-services-fraud theory, and the threat to state sovereignty inherent in "involv[ing] the Federal Government in setting standards of disclosure and good government for local and state officials." *McNally*, 483 U.S. at 360. Rather than rely upon these concerns alone, however, the Court invoked the rule of lenity to prevent the federal government from prosecuting state and local officials for depriving their constituents of the so-called "intangible right" to their "honest services." *Id.* "If Congress desires to [make such conduct a crime]," the Court warned, "it must speak more clearly than it has." *Id.*

Congress's response was swift, but no more precise. Within a year, it enacted 18 U.S.C. § 1346, a statute that "was never included in any bill as filed in either the House of Representatives or the Senate . . . was never the subject of any committee report from either the House or the Senate, and was never

the subject of any floor debate reported in the Congressional Record." *United States v. Brumley*, 116 F.3d 728, 742 (5th Cir. 1997) (Jolly, J., dissenting). That Section 1346 purports to criminalize "honest services fraud" is undisputable. But in the decades since its adoption, the courts have continually struggled to understand what that statute actually *means*. *See Sorich v. United States*, 129 S. Ct. 1308, 1311 (2009) (Scalia, J., dissenting from denial of certiorari) (noting "the conflicts among the Circuits; the longstanding confusion of the scope of [18 U.S.C. § 1346]; and the serious due process and federalism interests affected by the expansion of criminal liability" under the statute). The issue is far from academic, as federal prosecutors continue to exploit the ill-defined nature of honest services fraud in order to charge state government officials with federal felonies based on conduct not criminal under relevant state and local laws.

Petitioner, in his opening brief, accurately critiques Section 1346's checkered past and urges that the government must predicate any honest-services-fraud prosecution upon the violation of a duty imposed by some outside source—either state or federal law. Although adoption of such a limiting principle would represent a substantial step in addressing Section 1346's constitutional infirmities, NACDL submits that such a decision would not cure them entirely. As a result, it submits this *amicus* brief to elaborate upon and amplify two critical constitutional concerns raised by Petitioner's Brief: (1) that Section 1346 fails to provide the degree of fair warning required by the Due Process Clause, and (2) that Section 1346 invades a regulatory area constitution-

ally committed to the states under the doctrine of federalism.

When, prior to 1987, prosecutors used the same rudderless concept of "honest services fraud" to impose criminal liability on an unlimited range of conduct, this Court put an end to the practice. For the reasons set forth below, it should do the same today.

ARGUMENT

I. 18 U.S.C. § 1346 Is Unconstitutionally Vague, As It Fails To Provide Fair Notice Of Its Scope Or Meaning.

1. "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits[.]" *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion); *see also United States v. Diaz*, 712 F.2d 36, 40 (2d Cir. 1983) ("[F]undamental principles of due process . . . mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited."). As a result, a prosecution cannot stand if "the statute under which it is [maintained] fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008).

In response to these Due Process concerns, this Court has consistently adopted a rule of lenity, holding that courts must resolve questions concerning the scope or meaning of criminal statutes against the

government, "to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158 (1990). In *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008), this Court recently stressed the central role the rule of lenity plays in our constitutional structure:

> Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

This rule of lenity is particularly important in cases such as this. The Court already relied upon lenity concerns once to strike down the doctrine of honest services fraud in *McNally*, 483 U.S. at 359–360, and lenity concerns are "particularly weighty in the context of prosecutions of political officials, since such prosecutions may chill constitutionally protected political activity," *United States v. Panarella*, 277 F.3d 678, 698 (3d Cir. 2002). Therefore, as long as Section 1346 is vague, ambiguous, or otherwise suscep-

tible to multiple interpretations, prosecutions under it cannot stand.

2. The plain text of Section 1346 "simply provides no clue to the public or the courts as to what conduct is prohibited under the statute." *United States v. Rybicki*, 354 F.3d 124, 158 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting) (quoting *United States v. Handakas*, 286 F.3d 92, 104 (2d Cir. 2002)). Section 1346 states only that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. The section does not define "intangible right of honest services," and it leaves unanswered numerous questions about that concept:

> The term "intangible right" is not defined in the United States Code, is not defined in *Black's Law Dictionary*, and, prior to its use in § 1346, had never been used in any other statute of the United States. The term "honest services" is not defined anywhere in the United States Code, is not defined in *Black's Law Dictionary*, and had never been used in the United States Code prior to its use in § 1346. The phrase "the intangible right of honest services" is, therefore, inherently undefined and ambiguous.

Brumley, 116 F.3d at 742 (Jolly, J., dissenting).

Indeed, when taken on its face, the concept of "honest services" is virtually limitless, embracing conduct far removed from the bribery-type offenses that purportedly form the doctrine's "core." *See United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir.

2005) (identifying bribery as core example of honest services fraud). Almost any act by a public or private officer involving a trace of dishonesty, a remote element of self-interest, or a mistake made in the course of an officer's duties can be recharacterized as a failure to live up to the fiduciary obligation to provide "honest services":

> If the "honest services" theory—broadly stated, that officeholders and employees owe a duty to act only in the best interests of their constituents and employers—is taken seriously and carried to its logical conclusion, presumably the statute also renders criminal a state legislator's decision to vote for a bill because he expects it will curry favor with a small minority essential to his reelection; a mayor's attempt to use the prestige of his office to obtain a restaurant table without a reservation; a public employee's recommendation of his incompetent friend for a public contract; and any self-dealing by a corporate officer. Indeed, it would seemingly cover a salaried employee's phoning in sick to go to a ball game. . . . Quite a potent federal prosecutorial tool.

Sorich, 129 S. Ct. at 1309 (Scalia, J., dissenting from denial of certiorari); *see also United States v. Thompson*, 484 F.3d 877, 882 (7th Cir. 2007) (Easterbrook, J.) ("When the Supreme Court reverses a court of appeals, it is apt to say . . . that public officials have failed to implement the law correctly. Does it follow that judges who are reversed have deprived the

United States of their honest services and thus committed mail fraud?").

This very breadth has led courts to insist that the statute cannot possibly mean what it says: that it "does not encompass every instance of official misconduct that results in the official's personal gain." *United States v. Sawyer*, 85 F.3d 713, 725 (1st Cir. 1996); *see also Thompson*, 484 F.3d at 882 ("[N]o one *really* thinks that § 1346 treats all legal errors by public employees as criminal[.]"); *United States v. Welch*, 327 F.3d 1081, 1107 (10th Cir. 2003) (Section 1346 is "not violated by every breach of contract, breach of duty, conflict of interest, or misstatement made in the course of dealing"). "But why that is so, and what principle it is that separates the criminal breaches, conflicts and misstatements from the obnoxious but lawful ones, remains entirely unspecified." *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari). Such ambiguity is inevitable in light of Congress's decision to criminalize the doctrine of honest services fraud—using the exact same language that this Court found so troublesome in *McNally*—without making any effort to first define its contours.

Some courts have attempted to cure the statute's vagueness in any given case through reference to pre-*McNally* case law, on the theory that Congress passed Section 1346 simply to reverse this Court's decision and restore the same definition that existed previously. *See, e.g., United States v. Frost*, 125 F.3d 346, 364 (6th Cir. 1997). Yet such an approach merely replaces textual ambiguity with historical uncertainty. After all, "before *McNally* the doctrine

of honest services *was not a unified set of rules*." *Brumley*, 116 F.3d at 733 (emphasis added); *see also id.* (collecting cases; "Before *McNally*, the meaning of 'honest services' was uneven."); *cf. Rybicki*, 354 F.3d at 158 (Jacobs, J., dissenting) (observing that claim that Section 1346 reinstates pre-*McNally* decisions "gets us nowhere in terms of limits on prosecutorial power and notice to the public"). Indeed, as Judge Winter noted in his influential separate opinion in *United States v. Margiotta*, pre-*McNally* honest-services jurisprudence was riddled with the same confusion that now plagues Section 1346:

> One searches in vain for even the vaguest contours of the legal obligations created beyond the obligation to conduct governmental affairs "honestly" or "impartially," to ensure one's "honest and faithful participation" in government and to obey "accepted standards of moral uprightness, fundamental honesty, fair play and right dealing." . . . While there is talk of a line between legitimate patronage and mail fraud, there is no description of its location. With all due respect to the majority, the quest for legal standards is not furthered by reference to "the right to good government" and the duty "to act in a disinterested manner."

688 F.2d at 142–143 (Winter, J., concurring in part and dissenting in part). Given the well-documented ambiguities and contradictions within the area, courts cannot simply brush aside a challenge to Section 1346 on the basis that it was a legislative codification of some clear, extant judicial standard. *See*

also Brumley, 116 F.3d at 733 ("Congress could not have intended to bless each and every pre-*McNally* lower court 'honest services' opinion.") At the time of *McNally*, the honest services fraud doctrine was anything but clear.

Nor has the doctrine grown any clearer in the decades since the adoption of Section 1346. Given the "amorphous and open-ended nature" of Section 1346, the courts have consistently felt the need to graft *some* limitations upon its vague language. *United States v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008); *see also Rybicki*, 354 F.2d at 162 (Jacobs, J., dissenting) ("Even the circuits that have reinstated pre-*McNally* law recognize that ad hoc parameters are needed to give the statute shape."). Yet while all seem to agree that a limiting principle is needed to save this statute from certain demise, none can agree on which principle to apply:

- The Seventh Circuit has limited application of the statute to cases involving misuse of a position for private gain, *see United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998)—a construction found nowhere in the text and one that both the Third and Tenth Circuits have criticized, *see Panarella*, 277 F.3d at 691–692; *Welch*, 327 F.3d at 1107.

- The Third and Fifth Circuits, in turn, hold that an underlying violation of state law is necessary to support a federal honest-services conviction, *see Panarella*, 277 F.3d at 692–693; *Brumley*, 116 F.3d at 735—an approach that has met similarly strong opposition in other circuits. *See United*

States v. Martin, 195 F.3d 961, 966 (7th Cir. 1999).

- Even those circuits purporting to apply the pre-*McNally* definition of honest services fraud remain divided over the content of that definition—for example, whether "materiality" or "forseeability" properly defines the scope of the crime. *Compare Frost*, 125 F.3d at 364 (forseeability), *with United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996) (materiality), *and United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997) (same).

The result is chaos. Despite decades of opportunities to clarify the statute, the concept of honest services remains "vague and undefined," "frustrating" judicial efforts "to reduce the 'honest services' concept to a simple formula specific enough to give clear cut answers[.]" *Urciuoli*, 513 F.3d at 294, 300. Neither Congress's words nor judicial gloss has provided the public with a clear definition of what is criminal under Section 1346 and what is not.

3. Based in part upon the vagueness concerns detailed above, Petitioner argues that nondisclosures should be actionable under Section 1346 "only where they violate an established duty to disclose, under state or federal law, apart from § 1346 itself." Pet'r Br. 28. Yet although adoption of such a limitation would could constitute a step towards a clearer regime of honest services fraud, it would not wholly cure Section 1346's vagueness. Rather, several ambiguities would remain in the wake of such a decision.

First, requiring Section 1346 prosecutions to be predicated upon the violation of some extrinsic ethical duty would not necessarily address whether *only* state law can establish such obligations. Petitioner correctly notes that, given the circumstances of his prosecution and the record below, the instance case does not squarely present the question of whether federal law other than Section 1346 can define the scope of the duty to provide "honest services." Pet'r Br. 28–29. But as a result, a narrow judgment in this case will provide little clarity to those subjected to other pending or future prosecutions, who will still be uncertain even as to such a basic question as from where the duty of "honest services" arises.

Second, even if the Court reaches further and rules that only state law violations can serve as the basis of Section 1346 prosecutions, it would remain unclear whether Section 1346 is limited to violations of state *criminal* law, or if violation of *any* state law duty can trigger federal liability. *See, e.g.*, *Brumley*, 116 F.3d at 733–734 (requiring state law violation, but leaving open "the question of whether a breach of a duty to perform must violate the criminal law of the state"). Given that, in many states, ethical obligations are codified as a collection of civil *and* criminal statutes, *see, e.g.*, N.Y. Pub. Off. Law §§ 73–75, even general reference to state law it not enough to provide potential defendants with clear notice of what duties fall within or without the scope of Section 1346's purview.

Third, as Petitioner observes, limiting Section 1346's reach to cases in which a defendant violates some extrinsic legal duty fails to address confusion

over *which types* of violations rise to the level of failing to provide "honest services." Although the Alaska disclosure requirements evaluated by the district court in this case only require disclosure of actual conflicts of interest, *see* Pet'r Br. 32–33, many state ethical codes are prophylactic in nature—targeting not only actual corruption but also the potential appearance thereof. *See, e.g.*, *Sawyer*, 85 F.3d at 728 (recognizing that, because of appearance-of-corruption focus, not every violation of Massachusetts gift statute could be punished as honest services fraud). As a result, even invocation of state law will not fully address the problem that the term "honest services," standing alone, fails to provide meaningful guidance as to what it permits and what it forbids. Reference to state law, standing alone, simply does not provide clear enough guidance regarding where the alleged duty of "honest services" arises, how it is defined, and how such an obligation can be violated.

In the end, the only consensus regarding Section 1346 is that it cannot possibly mean what it says. Despite years of attempted judicial gap-filling, Section 1346 remains "vague and amorphous . . . and depends for its constitutionality on the clarity divined from a jumble of disparate cases." *United States v. Brown*, 459 F.3d 509, 523 (5th Cir. 2007). Rather than adopt yet another incremental refinement, Court should call an end to the experiment entirely, and strike down the statute as being unconstitutionally vague. To do otherwise would be to open a dangerous door: as currently drafted, Section 1346 "is nothing more than an invitation for federal courts to develop a common-law crime of unethical con-

duct," a notion that is "utterly anathema today." *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari); *see also Brown*, 459 F.3d at 523 n.13 (noting that the government's aggressive application of Section 1346 "crystallizes the danger we face of defining an ever-expanding and ever-evolving federal common-law crime"). It is not for the courts to have to write the law, define the offense, set its parameters and establish its elements. Unless and until Congress speaks to the issue with clearer language, this Court should once again inter the doctrine of honest services fraud.

II. 18 U.S.C. § 1346 Unconstitutionally Intrudes Upon State Sovereignty.

Although vagueness alone is enough to invalidate Section 1346, its constitutionality is further undermined by its subject matter. When applied to prosecute violations of alleged ethical obligations, the doctrine of honest services fraud "involves the Federal Government in setting standards of disclosure and good government for local and state officials"—an area raising grave federalism concerns. *McNally*, 483 U.S. at 360. Whether viewed as falling outside the scope of Congress's enumerated powers, *see United States v. Lopez*, 514 U.S. 549 (1995), or impermissibly violating the sovereignty of the individual states, *see New York v. United States*, 505 U.S. 144 (1992), the Constitution does not countenance federal efforts to define the duties that State officials owe to *their own* constituents or to micromanage the ethical responsibilities of elected state officials. *See* George D. Brown, *New Federalism's Unanswered Question: Who Should Prosecute State*

and Local Officials for Political Corruption?, 60 Wash. & Lee. L. Rev. 417, 428–430 (2003). At minimum, legislative inroads into such areas traditionally regulated by the states themselves require clearer authorization and justification than Section 1346 provides.

1. Although the federalism problems raised by Section 1346 can be cast in a variety of ways, each reduces to the same objection—by purporting to define a federal standard of "good government" with which state and local officials must comply, the federal government is impermissibly attempting to regulate an area constitutionally committed to the state. The *McNally* Court was well aware of this fundamental defect in the theory of honest services fraud, citing it as a reason to avoid any interpretation of the mail fraud statute that would "involve[] the Federal Government in setting standards of disclosure and good government for local and state officials[.]" 483 U.S. at 360. Section 1346's cursory text does nothing to minimize this constitutional flaw.

Over the past two decades, this Court has reminded Congress of a central truth of our constitutional structure: "The Constitution creates a Federal Government of enumerated powers," delegating to the federal government powers "few and defined" while reserving "numerous and indefinite" authority to the individual states. *Lopez*, 514 U.S. at 552 (quoting The Federalist No. 45, at 292–293 (James Madison) (C. Rossiter ed. 1961)). Respect for that allocation of power serves a critical purpose: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent

the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

This Court has implicitly reiterated this concern in cases involving federal restraints on the conduct of state government employees, including in the specific contexts of the mail and wire fraud statutes. Although not phrased in terms of the *Lopez* rule, both *McNally* and this Court's subsequent decision in *Cleveland v. United States* rejected efforts to expand the scope of the mail fraud act beyond the deprivations of property rights long considered actionable under the act. *See Cleveland v. United States*, 531 U.S. 12, 26 (2000) ("[T]he mail fraud statute . . . had its origin in the desire to protect individual property rights, and any benefit which the Government derives from the statute must be limited to *the Government's interests as property holder*." (quoting *McNally*, 483 U.S. at 359 n.8; emphasis by the *Cleveland* Court)). Such an effort reflects an appropriate enumerated-powers driven focus on the limits of the mail and wire fraud statutes. *Cf. Schmuck v. United States*, 489 U.S. 705, 722–723 (1989) (Scalia, J., dissenting) ("The law does not establish a general remedy against fraudulent conduct, with the use of the mails as a jurisdictional hook, but reaches only those limited instances in which the use of the mails is *a part of the execution of the fraud*, leaving all other cases to be dealt with by appropriate state law. In other words, it is mail fraud, not mail and fraud, that incurs liability." (citations omitted; emphasis in original)). Any effort to justify an aggressive reading

of Section 1346 based on either the Commerce Clause or Postal Power, then, is suspect. Brown, 82 Cornell L. Rev. at 253–254 (noting that the *McNally* Court rejected dissenters' argument that Postal Power justified interpreting Section 1341 to embrace honest services fraud).

The natural result of a constitutional system of limited federal powers is that the definition of the duties owed by state officials to their own constituents is one constitutionally reserved to the several states. *See Panarella*, 277 F.3d at 693 (prosecuting state public officials for honest services fraud creates "federalism concerns about the appropriateness of the federal government's interference with the operation of state and local governments"). Within our federal system, there exist certain areas of State control upon which the federal government cannot tread. Each government has "its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Terms Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Under this federal system, "a State's government will represent and remain accountable to its own citizens." *Printz v. United States*, 521 U.S. 898, 920 (1997). Thus, our state governments and their elected officials form, as James Madison explained, "distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the [national] authority than the [national] authority is subject to them, within its own sphere." The Federalist No. 39, at 245 (James Madison) (C. Rossiter ed., 1961).

At its root, our constitutional system simply does not grant the federal government the authority to dictate a universal code of ethics governing every state and local public official, especially "a freestanding, open-ended duty to provide 'honest services'—with the details to be worked out case-by-case." *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari). This Court should therefore heed the warning of *McNally*, strike down this statute, and refuse to endorse the notion that the federal government is authorized to enforce ill-defined "standards of disclosure and good government." *See* 483 U.S. at 360.

2. Once again, adoption of a state-law limiting principle would mitigate against, but not wholly cure, this constitutional defect. While interpreting Section 1346 to incorporate state law would lessen concerns about federal law imposing additional substantive requirements on individuals, it would still deprive states of their ability to make independent policy decisions in areas of traditional state concern on numerous secondary questions, including enforcement mechanisms, appropriate penalties, and the relative priorities of various laws. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)—and this is as true for remedies as for underlying substantive requirements. This Court has recognized the "fundamental interest in federalism that allows individual States to define crimes, punishments, rules of evidence, and

rules of criminal and civil procedure in a variety of different ways." *Danforth v. Minnesota*, 128 S. Ct. 1029, 1041 (2008) (holding that states may give broader effect than federal courts to new constitutional holdings). It substantially undermines that "fundamental interest" to borrow a state rule, potentially not even criminally enforceable, and turn it into a federal felony with a sentence of up to twenty years in prison. 18 U.S.C. § 1341. *Cf.* Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. Pa. L. Rev. 257, 259 & nn.10–16 (2005) (citing numerous examples of States' "diverse views on criminal law matters").

This case provides a perfect example. The prosecution has attempted to convict Petitioner based on alleged violated of Alaska's state ethical laws, but Alaska, like many states, does *not* impose any criminal penalties for violations of such conflict-of-interest or disclosure requirements. *See, e.g.*, Alaska Stat. § 24.60.240 (establishing only civil penalties for nondisclosure). Even in those states that do impose criminal punishment for conflicts of interest, nondisclosure, or improper gifts, such punishments are rarely felonies and are often narrowly circumscribed. *See, e.g.*, N.Y. Pub. Off. Law § 73-a(4) (allowing, in limited circumstances, punishment for nondisclosure as criminal misdemeanor, but also requiring that "[n]otwithstanding any other provision of law to the contrary, no other penalty, civil or criminal may be imposed for a failure to file, or for a false filing, of such statement[.]"). Using such civil statutes as the predicate for honest-services-fraud prosecutions would therefore invalidate these state decisions to

enforce their ethical codes through non-criminal means.

As a result, limiting Section 1346's applications to instances in which defendants violated duties created by underlying state ethical codes would continue to unconstitutionally interfere with state autonomy. Application of Section 1346 in the public-corruption context seeks to apply federal force to state officers for failing to live up to duties they allegedly owe to citizens of their states, acting in their official capacities. It is wholly unclear, however, what constitutional basis can support such charges. It cannot be based on a public official's obligation as a *private* citizen to comply with the federal mail and wire fraud statutes, as the duty alleged in most honest services fraud cases "is directed [at state officials] in their *official* capacities as state officers; it controls their actions, not as private citizens, but as the agents of the State." *See Printz*, 521 U.S. at 930 (emphasis added). Neither can the application of Section 1346 be grounded on some broad federal authority to regulate the ethical standards of state officers—as this Court has repeatedly held "that state legislatures are *not* subject to federal direction." *Id.* at 912 (citing *New York*, 505 U.S. 144 emphasis in original). Given the Constitution's emphasis on dual sovereignty, there is no room for Congress to declare "without any obvious limiting principles, [that] federal prosecutors [will] police honesty in the corridors of state government by invoking section 1346 against state employees for their acts of 'honest services' fraud." *Rybicki*, 354 F.3d at 164–165 (Jacobs, J., dissenting).

3. Even if the federalism concerns set forth above do not independently establish Section 1346's unconstitutionality, they trigger an additional clarity requirement upon Congress—one which the honest-services-fraud statute cannot satisfy.

In deference to the delicate balance between the federal and state governments, this Court requires Congress to speak clearly before regulating an area traditionally committed to state control. *United States v. Bass*, 404 U.S. 336, 349 (1971); *see also Rybicki*, 354 F.3d at 137 n.10 ("Congress must speak clearly when it legislates in areas of criminal law that are traditionally regulated by the states."). Indeed, this Court has *expressly* emphasized this rule as a critical limitation on the scope and application of the mail fraud statute:

> Absent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States.

Cleveland, 531 U.S. at 27; *see also United States v. Turner*, 465 F.3d 667, 683 (6th Cir. 2006) (reading Section 1346 narrowly in light of federalism-based clear-statement rule).

This clear-statement rule vindicates different interests from the due process concerns already discussed. While the rule of lenity focuses on giving citizens clear notice of their potential criminal liability, the federalism clarity standard ensures that the states receive indisputable notice of any federal efforts to usurp their authority. Yet, notwithstanding their divergent purposes, both concerns are triggered

by the same statutory ambiguities and confusions. It is certainly true that Congress intended to achieve *something* by adopting Section 1346, but the statute provides almost no guidance as to *what* that something is.

Indeed, the statute does not even clearly state that it has any application to state and local government officials. Had Congress wished to clearly evidence such an intention, it had the necessary tools—Senate-approved language would have explicitly regulated the ethical conduct of state and local government officials, but was never enacted into law. *See Brumley*, 116 F.3d at 745–746 (Jolly, J., dissenting); *see also* Pet'r Br. 3–6 (detailing evolution of Section 1346's text). With Congress having not done so explicitly, the Constitution does not permit federal prosecutors to exploit vague language in order to supersede states' rights to determine the codes of conduct governing their local public officials.

Thus, regardless of whether Congress *could* pass a statute purporting to regulate state-level ethical issues in such detail, it cannot be conclusively said that it *did* so by adoption Section 1346. In 1987, such concerns of vagueness, federalism, and lenity were enough to lead this Court to jettison the doctrine of honest services fraud entirely. *McNally*, 483 U.S. at 359–360. The twenty-eight words adopted by Congress in response to *McNally* hardly provide the clear instruction needed to grant the doctrine constitutional legitimacy.

CONCLUSION

For the reasons set forth above, this Court should rule in favor of the petitioner, reverse the Ninth Circuit's decision below, and invalidate 18 U.S.C. § 1346 on constitutional grounds.

Respectfully submitted,

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